

A
T R E A T I S E
OF THE
PLEAS OF THE CROWN;
OR,

SYSTEM OF THE PRINCIPAL MATTERS RELATING TO THAT
SUBJECT, DIGESTED UNDER PROPER HEADS.

IN TWO BOOKS.

BY
WILLIAM HAWKINS,
SERJEANT AT LAW.

BOOK THE FIRST.

THE SIXTH EDITION,

In which the Text is carefully collated with the original Work; the marginal References corrected; new References from the modern Reporters added; a Variety of *Manuscript Cases* inserted; and the whole enlarged by an Incorporation of the several Statutes upon Subjects of Criminal Law, to the TWENTY-SEVENTH YEAR OF GEORGE THE THIRD. To which an Explanatory Preface is prefixed, and new and copious Indices are subjoined.

BY
THOMAS LEACH, ESQ.
OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

L O N D O N:
PRINTED BY HIS MAJESTY'S LAW-PRINTERS.

PUBLISHED FOR THE EDITOR:

And sold by THOMAS WHIELDON, Bookseller, No. 43, Fleet-street.

Price One Pound Eight Shillings in Boards.

M,DCC,LXXVII.

THE RIGHT HONOURABLE
 SIR JAMES EYRE, KNIGHT,
 LORD CHIEF BARON
 OF HIS MAJESTY'S COURT OF EXCHEQUER.

MY LORD,

THE permission to inscribe my humble labours to your Lordship, is a testimony of your Lordship's known disposition to encourage even the appearance of useful industry.

The original Work, as well from the nature of its subject, as from its established merit, seems to possess a natural claim to your Lordship's protection. It regards a system of law, the most serious and important in its consequences to the interests of society; the profound knowledge, and firm, but benevolent administration of which, has eminently distinguished your Lordship in the eyes of the profession, and of the public.

Your Lordship will permit me to join in that respect and veneration which is so justly entertained for your Lordship's high judicial character; and particularly to express the honour and gratitude I feel in being allowed to subscribe myself,

MY LORD,

Your Lordship's

Most obedient

and obliged humble servant,

THOMAS JLEACH.

1, MITRE-COURT BUILDINGS,
 18, July 18, 1787.

TO THE RIGHT HONORABLE

THOMAS Lord *PARKER*,

Baron of *MACCLESFIELD*,

Lord Chief Justice of *ENGLAND*.

MY LORD,

THE following *Treatise*, containing that part of the law, which is peculiarly under the administration of the chief justice of *England*, I presumed, in regard to the subject of it, to think of presenting it to your lordship, which your goodness having been pleased to permit, it is with the less uneasiness that I venture to make it public; for I could not hope to introduce it into the world with greater advantage than under your protection.

This was the real ground of my ambition, to dedicate it to your lordship, and not to give myself an opportunity of publishing how much I honour those wonderful talents, that have raised you to so high a station: A private character indeed may be set forth to advantage, and many virtues in it be made known by an address of this nature, which might otherwise have lain for ever concealed: But your lordship's is public and conspicuous, and can appear no where with so much lustre as when you sit in judgment, where that vast genius you are blessed with, shines forth to all the world, adorned with all the improvements that human art can furnish, and supported with the greatest courage and integrity.

And nothing less, my lord, could give you that command of all the variety of business which comes before you, and that facility with which you dispatch it: The most intricate points of law, that have for ages lain in confusion and obscurity, when they fall under your lordship's consideration, receive such light, are stated and explained with such exact method, and such propriety and beauty of expression, that the most polite compositions appear not more elegant, nor the most demon-

The DEDICATION.

strative more convincing: This, my lord, is the agreeable part of the exercise of your authority, being no violence to that general humanity which you delight to shew to all mankind: But the duties of your office require you sometimes to put on another character and to shew the awful face of justice, to curb the rage of an unruly people, and to fright them into their duty by the terrors of the law; and 'tis with pleasure all good men see your lordship pursue the prevailing vices of the age with such zeal and indignation, that crimes no longer appear less odious for being fashionable, nor are they more secure from punishment for being popular.

These, My lord, are blessings which the whole nation shares in, and have an influence upon all parts of the civil administration: But we, who have the honour to attend your lordship at the bar, are in a more particular manner to acknowledge our obligations, for that candor and condescension with which you treat us: The encouragement you give to our weak endeavours, no less engages our affections, than your comprehensive knowledge and clear and accurate judgment command our reverence and esteem.

Such goodness charms all that approach and feel it; and it was with universal joy we saw your lordship's firmness to the present establishment, and great services to your country, distinguished lately by an accession of honor from his majesty, whose wisdom in conferring his favours has eminently appeared, by the many signal benefits the nation has received from those who have the honor to serve him. I am with the greatest respect,

MY LORD,

YOUR LORDSHIP'S

MOST OBLIGED,

AND MOST HUMBLE SERVANT,

WILLIAM HAWKINS.

A U T H O R's . P R E F A C E.

NOTHING is more common than to hear those who have taken only a superficial view of the crown-law, charge it with numberless hardships and undistinguishing rigor; whereas those, who have more fully examined it agree, that it wants nothing to make it admired, for clemency and equity, as well as justice, but to be understood: It is to agreeable to reason, that even those who suffer by it, cannot charge it with injustice; so adapted to the common good, as to suffer no folly to go unpunished, which that requires to be restrained; and yet so tender of the infirmities of human nature, as never to refuse an indulgence, where the safety of the public will bear it: It gives the prince no power, but of doing good; and restrains the people from no liberty, but of doing evil,

It would be needless therefore to say any thing of the usefulness of this treatise, could I be so happy as any way to come up to the design of it, which was to vindicate the justice and reasonableness of the laws concerning criminal matters, and to reduce them into as clear a method, and explain them in as familiar a manner, as the nature of the thing will bear.

Had any of these great men, who formerly have written on this subject, gone through the whole law relating to it, all farther attempts of this kind had been unnecessary. The treatise, published under the name of Sir *Mathew Hale*, is indeed very useful, and written in a clear method, and with great learning and judgment; but it is certainly very imperfect in the whole, and seems to be only a model or plan of a work of this kind, which is said to have been intended by him.

Sir *Edward Coke*'s third Institute is also a treatise of great learning, and not unworthy of the hand that produced it; but yet it seems by no means a compleat work, many considerable heads being either wholly omitted in it, or barely touched upon.

The P R E F A C E.

The treatise of Sir *Will. Staundforde* seems to be writ with great judgment, but he takes in a very small compass, scarce mentioning any offences under felonies.

As for the treatises of *Lambard*, *Crompton*, *Pulton*, and *Dalton*, they having an eye chiefly to the direction of justices of peace; and, treating of the crown-law no farther than as it concerns them, are far from being compleat systems of it.

Upon the whole, I apprehend that none of the authors before mentioned were so perfect, but that, by reducing all the laws relating to this subject, under one general scheme, they might generally be understood with much less difficulty than they have hitherto been. This 'twas induced me to write on this subject, and I hope to finish the whole in two books, proposing in this first to shew the nature of criminal offences; and in the second, the manner of bringing offenders to punishment.

THE
EDITOR'S PREFACE
TO THE THIRD EDITION.

IN this edition abstracts of the statutes made since the Author wrote relating to the subject of this Treatise, have been added. Care has also been taken to make additional references to the reports published since our Author finished this work, and to Sir Matthew Hale's *Historia Placitorum Coronæ*. Such references as only tend to confirm what is advanced in the text are thrown into the margin; but where new points or differences seemed to occur, it was thought proper to place them, together with the abstracts of the statutes, by way of addition at the end of each book; by which means the learned serjeant's work is kept unmixed with any thing of the editor's; and the pages of this edition are made to correspond with those of the former, so that references to our author from the modern books may be turned to with equal ease as before.

G. L. SCOT.

THE
EDITOR'S PREFACE
TO THE FOURTH EDITION.

THIS same method has been observed in this edition as by the above G. L. Scot, in referring not only to the Statutes, but also to the later Reports, viz. Lord Raymond's, Sir John Strange's, and other authors of the best authority, brought down to the present time.

THE
EDITOR'S PREFACE
TO THE FIFTH EDITION.

THIS edition is improved with extracts from the late Mr. J. Foster's *Crown Law*; *Cases Tempore Hardwicke Ch. J. Master Burrow's and Mr. Serjeant Willson's Reports*; Mr. J. Blackston's *Commentaries*; and from the *Statutes*, to 10 Geo. III. inclusive.

Ἄνθρωποι παραδεδωκόσι τὰς ψυχὰς αὐτῶν ὑπὲρ τοῦ ὀνόματος τοῦ κυρίου ἡμῶν Ἰησοῦ Χριστοῦ.—Act, Apost. xvi. 26.

PREFACE

P · R · E · F · A · C · E ·

TO THE

P R E S E N T E D I T I O N .

THE high estimation in which Mr. SERJEANT FLEWKINS' Treatise of the PLEAS OF THE CROWN has been universally held by the Gentlemen of the profession, renders any attempt either to praise or to explain the original work unnecessary. But as the present edition is materially different, from all those which have preceded it, the Editor feels it incumbent on him to describe the general design upon which he has endeavoured to raise this invaluable production from its former state of imperfection.

This admired Treatise of Criminal Law, was first published soon after the accession of the present Royal Family to the throne. The increase of commerce, opulence, and luxury, since that period, has introduced a variety of temptations to fraud and rapine, which the legislature has been forced to repel, by a multiplicity of occasional statutes, creating new offences and inflicting additional punishments.—These statutes, are now, for the first time, incorporated with the original text, digested into order, and either arranged under the several titles to which they respectively belong, or erected into separate and independent chapters, in the form of Appendix.—To prevent, however, the reputation of the Author from the danger of being injured by any false or injudicious insertion of the Editor, the new matter is carefully distinguished by this mark †, at the opening of each section.

But while, during this interval, the legislature was thus anxiously providing new laws, to meet the various emergencies of
the

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the times, many of the statutes recited in the former editions of this work, either expired, or were repealed:—Of this dead and useless matter, the Editor has preserved such portions only, as are made the subjects of the author's observations.—These observations, it is true, are the expositions of statutes now extinct; but as they peculiarly form a part of the original composition, it would have been a violation of his duty as Editor, to have expunged them, and would have deprived the Author of a proportionate share of the veneration and respect with which every part of his work has been uniformly and deservedly honoured. The preservation of them indeed may prove essentially useful; for as many of the new statutes frequently pursue, with very little variation, the language of the old enacting clauses, the sound constructions that have expounded the one, will serve either directly, or by analogy, to illustrate and explain the other.

The many other parliamentary alterations which the criminal laws of this country have undergone, during the long course of near seventy years, are also ingrafted into the body of the work; and the whole text is carefully collated with the former editions, and with the printed statutes.

The multiplicity of marginal references, with which this work so peculiarly abounds, was continued, in the former editions, without intermission, throughout the page: and the eye was, thereby, forced upon a painful research, to find the letters by which their several applications were intended to be discovered. This obscurity is removed; and they are now placed opposite the respective sections to which they refer.—These references have also undergone a careful examination; those which were found to burthen the margin without illustrating the text are expunged; and new citations extracted from all the modern reporters are inserted in their stead. But this new arrangement of the references has compelled the Editor to abandon the usual mode of printing the pages of the old editions in the margin. He has, however, prefixed a table to each volume, which exhibits, at one view, where every page in the former editions begins and ends in the present work.

To the text thus formed and brought down to the present session of parliament, the determinations of the superior courts, decisions

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decisions of the judges upon reserved cases, and points ruled by authority upon trials, are added as commentaries, and made to accompany the sections they are designed to expound.

Upon this part of the work the Editor is fearful that his zeal not to omit any illustration, which, by possibility, might be useful, have betrayed him into the error of inserting many notes, either not sufficiently compressed or superabundant. He flatters himself, however, that as many of them are transcribed from MANUSCRIPT CASES, which have never before been printed, their novelty will, in some measure, compensate both for their length and multiplicity.

The sources from which he has derived his collection of manuscript cases have been various; but he has inserted those only which appeared to him to possess unquestionable authenticity. If, upon inspection, any should be found not perfectly correct, it should be remembered, that decisions upon reserved cases of criminal law, are not, like arguments relating to property, open to the acquisition of attentive industry in WESTMINSTER HALL, but, being, in general, discussed by the judges themselves, and the resolutions delivered at the several circuits, on which the cases arose, they are to be acquired only by the favour of the judges, or by the private friendship of those to whom they may have been communicated. Upon this subject the Editor, with a mixture of pride and gratitude, acknowledges the great and liberal assistance he has received from his professional friends, whose kindness will, perhaps, be found to form the most valuable part of the work.

The Author, in his Preface, declares that it was his intention “to reduce all the laws relating to THE PLEAS OF THE CROWN, under one general scheme, that they might be understood with much less difficulty than they had been.”—To accomplish this design of his Author, the Editor has anxiously endeavoured to form the work into one complete and entire code of *English* criminal jurisprudence, as it exists at this day, upon the records of the law: but he is fearful that his zeal has led him to attempt a performance too difficult for his exertions to attain, as, upon a review of the sheets, several alterations and arrangements have suggested themselves to his mind, which he conceives would have rendered the whole more perfect and complete.

Confident,

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Confident, however, that no pains have been spared, and relying that the work has received a real and useful improvement from the alterations and additions which have been made, he respectfully submits his labours to the judgment, candour, and protection of a learned and liberal profession.

A · N · A · L · Y · S · I · S

OF THE FIRST BOOK OF

The Pleas of the Crown.

ALL persons whatsoever are liable to be punished as criminal offenders, unless they can excuse themselves, either,

- 1 In respect of their want of reason ; or,
- 2 In respect of their subjection to the power of others, c. 1.

Offences, considered in relation to the persons against whom they are committed, are either,

- 1 Such as are more immediately against God ; or,
- 2 Such as are more immediately against man.

Offences more immediately against God, are either by common law or by statute.

Those at common law are either capital, or not capital.

The capital are of three kinds.

- 1 Heresy, c. 2.
- 2 Witchcraft, c. 3.
- 3 Sodomy, c. 4.

Those not capital are either by common law or statute.

Those by common law are of five kinds,

- 1 Blasphemies against God, c. 5. f. 1.
- 2 Scoffing at the scriptures, c. 5. f. 2.
- 3 Impostures in religion, c. 5. f. 3.

4 Open lewdness grossly scandalous, c. 5. f. 4.

5 Seditious words against the established religion, c. 5. f. 6.

Those by statute are two-fold,

- 1 Such as are against religion in general.
- 2 Such as are against the established church.

Those against religion in general are of four kinds,

- 1 Profanations of the Lord's day, c. 6. f. 1, 2, 3.
- 2 Profane swearing and cursing, c. 6. f. 4.
- 3 Drunkenness, c. 6. f. 5.
- 4 Reviling the Lord's Supper, c. 6. f. 6.

Those against the established church are three-fold.

- 1 Such as concern all persons in general.
- 2 Such as more immediately relate to those of the popish religion.
- 3 Such as more immediately regard protestant dissenters, c. 16.

Those which concern all persons in general, are either,

- 1 Against the common prayer, c. 7. or,
- 2 In accepting or holding an office without due conformity to the church, c. 8. or,

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- 3 In teaching school without conforming to the church, c. 9. or,
- 4 In not coming to church. c. 10. 11.

Those relating more immediately to persons of the popish religion, are of four kinds,

- 1 Popish recusancy, c. 12.
- 2 The offence of saying or hearing of mass, or other popish service, c. 13.
- 3 The offence of not making a declaration against popery, c. 14.
- 4 The offence of promoting or encouraging the popish religion; either,
 - 1 In saying receiving popish books, c. 1, 2, 3.
 - 2 In referring the popish religion, c. 15. f. 1. m. f. 4. to f. 15.
 - 3 In buying or selling popish books, c. 1. 11.

Offences more immediately against the king, are either more directly against the king, or more immediately against the subject

Those more particularly against the king, are either capital or not capital.

The capital are either;

- 1 High treason; or,
- 2 Felonies.

High treason is either,

- 1 Such as is within 25 Ed. 3. and other statutes grounded upon it, and explaining it; or,
- 2 Such as depends upon subsequent

Of treason within 25 Ed. 3. there are four species.

- 1 That which immediately concerns the king, his wife or children, c. 17. f. 3, 4, &c.
- 2 That which concerns his office in the administration of justice, c. 17. f. 46.
- 3 That which concerns his seal, c. 17. f. 48.
- 4 That which concerns his coin, c. 17. f. 54.

Of high treason depending on subsequent statutes, there are three species.

- 1 Offences in upholding or favouring the power of the pope.

- 2 Offences against the protestant succession, c. 17. f. 85.

- 3 Offences in-listing men without the king's licence, c. 17. f. 86.

Of offences in upholding or favouring the power of the pope, there are five species.

- 1 Extolling the pope's power, c. 17. f. 72.
- 2 Putting in ure popish bulls, c. 17. f. 75.
- 3 Perverting others, or being perverted to popery, c. 17. f. 76.
- 4 Receiving popish orders or education in popish seminaries, and not submitting, &c. c. 17. f. 79.
- 5 Refusing a second tender of the oaths, c. 17. f. 84.

Felonies more immediately against the king, are of five kinds,

- 1 Offences relating to the coin or bullion.
- 2 Offences against the king's council, c. 18. f. 8.
- 3 The offence of passing beyond sea, to serve a foreign prince, c. 18. f. 10.
- 4 The offence of embezzling the king's armour, c. 18. f. 12.
- 5 The offence of relieving a popish priest, c. 18. f. 14.

Of felony relating to the coin or bullion, there are three species.

- 1 The offence of debasing it, c. 18. f. 1.
- 2 The offence of unlawfully diminishing it, c. 18. f. 2.
- 3 The offence of endeavouring by extraordinary means to increase it, c. 18. f. 7.

Of offences more immediately against the king, not capital, there are two kinds,

- 1 *Præmunire*.
- 2 *Misprision*.

Offences coming under the notion of *Præmunire*, are either,

Against

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- 1 Against the prerogative of the crown; or,
- 2 Against the authority of the king and parliament, c. 19. f. 44.

Of offences of this kind against the prerogative of the crown, there are nine species,

- 1 Making use of papal bulls, c. 19. f. 22.
- 2 Derogating from the king's common law courts, c. 19. f. 14.
- 3 Appealing to Rome from any of the king's courts, c. 19. f. 20.
- 4 Exercising the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, c. 19. f. 21.
- 5 Refusing to elect or consecrate the person nominated by the king to a bishoprick, c. 19. f. 22.
- 6 Maintaining the pope's power, c. 19. f. 23.
- 7 Bringing in *Agnus Dei*, c. 19. f. 24.
- 8 Contributing to the maintenance of a popish seminary, c. 19. f. 26.
- 9 Refusing the oaths, c. 19. f. 27.

Misprisions more immediately against a king are either negative or positive. The negative is commonly called *misprision of treason*, c. 20.

Positive misprisions of this kind either amount to misprision of treason, or do not.

Of such misprisions, amounting to misprision of treason, there is only one species; forging foreign coin not current here, c. 20. f. 7.

Of such misprisions not amounting to misprision of treason, there are four kinds,

- 1 Contempts against the king's palace or courts of justice, c. 21.
- 2 Contempts against his prerogative, c. 22.
- 3 Contempts against his person or government, c. 23.
- 4 Contempts against his title, c. 24.

Of contempts against the king's prerogative, there are three species,

- 1 Refusing to assist him, for the good of the public, c. 22. f. 21.

- 2 Preferring the interests of a foreign prince to that of our own, c. 22. f. 3.
- 3 Disobeying the king's lawful commands or prohibition, c. 22. f. 4.

Of contempts against the king's person or government, there are six kinds,

- 1 Charging the government with oppression or weak administration, c. 23. f. 2.
- 2 Doing an act which impliedly encourages rebellion, c. 23. f. 4.
- 3 Endeavouring to frighten the king into a change of his measures, c. 23. f. 4.
- 4 Spreading false rumours concerning the king's intentions, c. 23. f. 5.
- 5 Charging him with a breach of his coronation oath, c. 23. f. 6.
- 6 Speaking contemptuously of him, c. 23. f. 7.

Of contempts against the king's title, there are two kinds,

- 1 Denying his title, c. 24. f. 1.
- 2 Refusing to take the oaths required by law for the support of his go.

Of offences in refusing to take such oaths, there are two kinds,

- 1 The offence of refusing the oath required by common law, c. 24.
- 2 The offence of refusing the oath required by statute.

Of offences in refusing the oaths required by statute, there are two kinds.

- 1 The offence of refusing the oaths of allegiance and supremacy, c. 24. f. 4.
- 2 The offence of refusing the oath of abjuration, c. 24. f. 6.

Offences more immediately against the subject, are either capital or not capital.

The capital are either by the common law or by statute.

Those by the common law are committed either,

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- 1 Against the life of a man; or,
- 2 Against his goods; or,
- 3 Against his habitation; or,
- 4 Against public justice.

Those against the life of a man, are either,

- 1 Casual, not being occasioned by the default or procurement of any man, c. 26. or,
- 2 Such as come under the notion of homicide, being occasioned by a man, c. 26. l. 2.

Of homicides there are two kinds,

- 1 Such as is committed against a man's own life, c. 27.
- 2 Such as is committed against the life of another.

Of homicide against the life of another, there be two kinds,

- 1 Such as amounts not to felony.
- 2 Such as amounts to felony.

Of such homicide not amounting to felony, there are two kinds,

- 1 Justifiable.
- 2 Excusable.

Justifiable homicide is either of a public or a private nature.

That of a public nature is of two kinds,

- 1 Such as happens in the due execution, c. 28. f. 4. and,
- 2 Such as happens in the due advancement of public justice.

Of the latter there are two kinds,

- 1 Such as happens in criminal, c. 28. f. 11. and
- 2 Such as happens in civil causes, c. 28. f. 17.

Of justifiable homicide of a private nature, there are two kinds,

- 1 Such as happens in killing a wrong doer, c. 28. f. 21.
- 2 Such as happens in killing an innocent person, c. 28. f. 26.

Of excusable homicide there are two

- 1 Homicide *per infortunium*, c. 29. f. 1.
- 2 Homicide *se defendendo*, c. 29. f. 12.

Homicide against the life of another, amounting to felony, is either with or without malice.

That which is without malice is called manslaughter or chance-medley, c. 30.

Of such homicide with malice, there are two kinds,

- 1 Murder, c. 31.
- 2 Petit treason, c. 32.

Of murder there are two kinds,

- 1 Such as is done with express malice
- 2 Such as is done with implied malice.

Of murder done with express malice, there are three kinds,

- 1 Such as happens in duelling, c. 31. f. 21.
- 2 Such as happens in killing another without any provocation; or but upon a slight one, c. 31. f. 32.
- 3 Such as happens in killing one whom the person killing intended to hurt in a less degree, c. 31. f. 28.

Murder done with implied malice generally happens in the following instances:

- 1 Where the principal intention is to commit another felony, c. 31. f. 41.
- 2 Where the principal design is to commit a bare breach of the peace, not intended against the person or him who happens to be slain, c. 31. f. 46.
- 3 Where the chief motive is to assist a third person, c. 31. f. 49.
- 4 Where the direct design is to escape from an arrest, c. 31. f. 55.
- 5 Where the principal purpose is to usurp an illegal authority, c. 31. f. 59.
- 6 Where no mischief is intended at all, c. 31. f. 61.

Of petit treason there are three kinds,

- 1 Where a servant kills his master.
- 2 Where a wife kills her husband.
- 3 Where an ecclesiastical person kills his prelate.

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Of capital offences at common law against the goods of another, there are two kinds.

- 1 Simple larceny.
- 2 Mix'd larceny.

Of simple larceny there are also two kinds.

- 1 Gross larceny, c. 32. f. 1.
- 2 Petit larceny, c. 32. f. 31.

Mix'd larceny is either from the person of a man, or from his house, c. 36.

Of mixed larceny from the person, there are two kinds,

- 1 Robbery, c. 34.
- 2 Larceny from the person, c. 35.

Also there is another offence of this nature called piracy, c. 37.

Capital offences at common law against the habitation of a man, are of two kinds,

- 1 Burglary, c. 38.
- 2 Arson, c. 39.

Offences more immediately against the subject, made capital by statute, are such as are committed,

- 1 Against women, (and of these there are two kinds,

- 1 Rape.
- 2 Forcible marriage.)

- 2 Against the rights of marriage, c. 43.

- 3 Against the members of a man's body, c. 44.

- 4 Against records, c. 45.

- 5 Against cattle, c. 56.

- 6 By purveyors, c. 47.

- 7 By soldiers and mariners, c. 48.

- 8 By hunters, c. 49.

- 9 By destroyers of fences, turnpike roads and bridges, c. 50.

- 10 By gaolers, c. 51.

- 11 By transporters of sheep or wool, c. 52.

- 12 By servants, c. 53.

- 13 By Egyptians, c. 54.

- 14 By cutters of pow-dike, c. 55.

- 15 By trespassers on the borders and rioters, c. 56.

- 16 By bankrupts, c. 57.

- 17 By counterfeiters of bank notes, exchequer bills, stamps, South-sea bonds, lottery orders, &c. c. 58.

- 18 Against property adherent to the freehold. App. 1.

- 19 Against ships in distress, &c. App. 2.

- 20 By taking fish, &c. App. 3.

- 21 By malicious incendiaries. App. 4.

- 22 By shooting at another, and threatening letters. App. 5.

- 23 By smugglers. App. 6.

- 24 By buying and receiving stolen goods. App. 7.

- 25 By advertising a reward. App. 8.

- 26 By destroyers of garments, shop-birds, and game engines. App. 9.

- 27 By destroying of looms, &c. App. 10.

- 28 By not performing quarantine. App. 11.

- 29 By hindering the exportation of corn. App. 12.

- 30 By returning from transportation. App. 13.

- 31 By assaulting with intent to rob. App. 14.

Offences more immediately against the subject not capital, are of two kinds,

- 1 Misdemeanors, c. 59.

- 2 Other inferior offences.

Such inferior offences are of two kinds,

- 1 Such as amount to an actual disturbance of the peace.

- 2 Such as do not amount to such a disturbance.

For the prevention of the former of these kind of offences, the law has provided two remedies,

- 1 By surety for keeping the peace, c. 60.

- 2 By surety for the good behaviour, c. 61.

Of the abovementioned offences amounting to the actual disturbance of the peace, there are two kinds,

- 1 Such as may be committed by one or two persons.

- 2 Such as require a greater number.

Of those which may be committed by one or two persons, there are four kinds,

- 1 Assaults, c. 62. f. 1.

- 2 Batteries, c. 62. f. 2.

- 3 Aftays,

AN ANALYSIS OF THE PLEAS OF THE CROWN.

3 Affrays, c. 63.

4 Forcible entries and detainers, c. 64.

Of those which require a greater number of persons there are three kinds,

1 Riots, c. 65. f. 1.

2 Routs, c. 65. f. 8.

3 Unlawful assemblies, c. 65. f. 9.

Of such inferior offences not amounting to an actual disturbance of the peace, there are two kinds,

1 Such as are committed by officers.

2 Such as are committed by common persons, without any relation to an office.

Of offences of this nature, committed by officers, there are three species.

1 Neglect or breach of duty, c. 66.

2 Bribery, c. 67.

3 Extortion, c. 68.

Of offences of this nature, committed by private persons, without any relation to any office, there are two kinds,

1 Such as are infamous and grossly scandalous, proceeding from principles of downright dishonesty, malice, or faction.

2 Such as are of an inferior nature, and neither infamous nor grossly scandalous.

Of offences of the first sort, there are six species,

1 Perjury, c. 69.

2 Forgery, c. 70.

3 Cheats, c. 71.

4 Conspiracy, c. 72.

5 Life B, c. 73.

6 Keeping of a bawdy house, and other unlawful place, c. 74.

Of offences of the latter sort, there are two kinds,

1 Such as more immediately affect the public.

2 Such as more immediately affect the interests of particular persons.

Of those which more immediately affect the public, there are four kinds,

1 Common nuisances, c. 75.

2 Monopolies, c. 79.

3 Forestalling, engrossing, and regrating, c. 80.

Of victuals, app.

4 Barratry, c. 81.

The most remarkable kinds of common nuisances are,

1 Such as relate to highways and turnpike roads.

2 Such as relate to public houses, c. 78.

Those which relate to highways come under a twofold consideration,

1 As they relate to highways and turnpike roads in general, c. 76.

2 As they relate to bridges in particular, c. 77.

Of the offences above-mentioned more immediately affecting the interests of particular persons there are three kinds,

1 Usury, c. 82.

2 Maintenance,

3 Buying or selling a pretended title, c. 80.

Maintenance is two-fold.

1 *Ruralis*, c. 67. f. 2.

2 *Curialis*, c. 82. f. 3.

Of maintenance *curialis* there are three species,

1 General maintenance, c. 83. f. 4.

2 Champerty, c. 84.

3 Embracery, c. 85.

Of seducing artificers.

Of acting plays without licence.

Of embezzling naval stores.

Of exercising a trade without serving apprenticeship.

Of granting fraudulent permits.

Of furcharging boats.

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A N A C C O U N T

OF

THE AUTHORS REFERRED TO IN THIS WORK.

A.

A Leyn
And..
Aff.
Atk.

A Leyn's Reports.
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Atkyn's Reports.

B.

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Bar. K. B.
Barr.
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Bridg.
Bro.
Bul.
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Bull. N. P.

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Bracton, De legibus & consuetudinibus Angliæ.
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Sir James Burrow's Reports.
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Cas. in Parl.
Caw. Cawley
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Com. Dig.
Co.
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C. Jac.
C. Car.
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the Year 1606.
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D.

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Dalt.	<i>Dalton's Country Justice, printed in the Year 1655.</i>
Danv. Abr.	<i>D'Anvers's Abridgment,</i>
Dav. Davis	<i>Davis's Reports.</i>
Dy. Dyer	<i>Dyer's Reports.</i>
Dougl.	<i>Douglas's Reports.</i>
D. & E. Durnf. & East }	<i>The Term Reports by Charles Durnford and Edward Hyde Esq, Esquires.</i>

F.

Far.	<i>Farrersley's Reports</i>
F. N. B.	<i>Fitzherbert's Natura Brevium</i>
Fitz.	<i>Fitzherbert's Abridgment.</i>
Fitzg.	<i>Fitzgibbon's Reports.</i>
Flet.	<i>Fleta.</i>
Fof.	<i>Foster's Reports and Discourses upon Crown Law.</i>

G.

Gibb. Gibson	<i>Gifford's Codex Juris Ecclesiastica Anglicani.</i>
Godb.	<i>Goddard's Reports.</i>

H.

1 Hale	}	<i>Hale's Historia Placitorum Coronae,</i>
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K.

Kell.	<i>Kelle's Reports,</i>
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L.

Lam. Lamb.

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Lev. :

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{ *Lambard's Office of Justices of Peace, printed in the Year 1614.*

Lane's Reports.

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• *Lord Raymond's Reports.*

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Pol. Poph.

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Pulton, De Pace Regis & Regn.

R.

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Seld. E. pin.	<i>England's Epinomis by Mr. Selden, printed in the Year 1683.</i>
Show.	<i>Shower's Reports.</i>
Sid.	<i>Siderfin's Reports.</i>
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St. Tr.	<i>State Trials.</i>
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Stun.	<i>Hales's Summary of the Pleas of the Crown.</i>
S. P. C.	<i>Staundford's Pleas of the Crown.</i>

T.

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Trem.	<i>Tremaine's Pleas of the Crown.</i>
Term Rep.	<i>The Term Reports.</i>

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Vent.	<i>Ventris's Reports.</i>

W.

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Win. Winch	<i>Winch's Reports.</i>
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Wood's Inf.	<i>Wood's new Institute of the Imperial or Civil Law</i>
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Y.

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Yel.	<i>Yelverton's Reports.</i>

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ERRATA et ADDENDA.

Page 9 chap. 4, dele *horrendum*, &c.

75 line 5, instead of "*with such licence*," read "*without such licence*."

125 note (1), line 2, instead of "*pound*" read "*pond*."

132 sect. 3, after "*B. Tresf. 8. 12.*" in mar. read "*Lucas 95.*"

133 sect. 7, lines 3 and 4, instead of "*may be*," read "*is*."

153 sect. 7, line 4, instead of "*if it been*," read "*if it had been*."

164 sect. 18, note (d), after "*MS.*" read "*Sed Vide 1 Shower 53.*"

168 after line 16, "read "*30 By return from transportation—31 By assaulting with intent to rob.*"

172 after sect. 10, "read "*Secondly.*"

173 sect. 12, line 18, note in mar. after "*penalties*," read "*vide also upon this subject.*"

175 instead of "*cb. 34.*" read "*cb. 44.*"

177 sect. 4, line 11, instead of "*Justice Ingram*," read "*Justice Hengham.*"

250* line 5, after "*Edward*," read "*the Fourth.*"

290 sect. 54, instead of "*lease now expired*," in mar. read "*lease then expired.*"

312 sect. 2, note (1), line 3, after "*383*," read "*12 Mod. 314.*"

386 note (14), line 13, instead of "*inquisition are made*," read "*be made.*"

457 line 32, of the text, instead of "*punished er for*," read "*punished as for.*"

470 sect. 1, line 2, instead of "*an allowance*," read "*is an allowance.*"

526 sect. 13, after "*12 Mod. § 16*," in mar. read "*2 Atkms 340.*"



A
T R E A T I S E
O F
THE PLEAS OF THE CROWN.

BOOK THE FIRST.

CHAPTER THE FIRST.

OF THE PERSONS WHO MAY BE GUILTY
OF CRIMINAL OFFENCES.

THE guilt of offending against any law whatsoever, necessarily supposing a wilful disobedience, can never justly be imputed to those who are either incapable of understanding it, or of conforming themselves to it. Therefore, before I come to the several kinds of offences, I shall shew what degrees of discretion and freedom are required in the commission of them. For the better understanding whereof, I shall consider what offenders are excusable.—First, in respect of their want of reason.—Secondly, in respect of their subjection to the power of others.

§ 27. 1. As to the First point it is to be observed, that those who are under a natural disability of distinguishing between good and evil, as (1) infants under the age of dif-

B. Cer. 61.
170.
Fid. 125, 126.
129.

Sim. 10. 28. 43. 3 Inst. 4. Del. c. 147. 1 Hale 16. 20. 515. Co. Lit. 477. 4 Co. 124
Hob. 224. 8 St. Tr. 123.

10. On the attainment of fourteen years of age, the criminal responsibility is subject to the force, more or less, of the intellect. The intellect of young persons is not perfect, but the human mind has matured, at the period, to a complete sense of right or wrong. *Pratt v. State*, 6 Cal. 404; *Long v. State*, 24 Cal. 206; *De la Cruz*, 60 Cal. 505. During the interval between the age of fourteen years and that of twenty, the mind is *per se* presumed to be immature and with little, if not no, discernible tendency in its favour of innocence, accumulate in an inverse proportion with the age. The tendency toward the offender's guilt. *People v. Hale*, 25 Cal. 27. From this supposed link of the mind, the presumptive liability of the law follows, without anxious circumlocution, I can't say that to be convicted on circumstantial evidence. *People v. Jones*, 36 Cal. 1 Hale 274. Vol. 70. Yet if it appear in doing and doing evidence and circumlocution that he is perfectly conscious of the nature and morality of the crime, the course of a juror may find him guilty, and judgment of death may be then against him. *People v. Hale*, 25 Cal. 27. B. Cr. 123. 4 Comm. 21. Fol. 71. O. B. 1784, c. 171. *People v. Jones*, 36 Cal. 1784, c. 171. and the equality of contrasting guilt is measured more by the apparent strength of the intellect, understanding than by years and days. B. Cr. 74. 4 Comm. 21. But within the area of fourteen years, a child cannot be punished for any capital offence, whatever circumstances or a malady or circumstance may appear; for *ex presumptis factis*, he cannot have life taken against the presumption. No argument shall be admitted. *People v. Jones*, 36 Cal. 1784, c. 171. Fol. 349. 4 Comm. 23. Comp. 222, 223. Therefore if a child under the age of fourteen years is found guilty of murder, he cannot be punished for either the felony or the death. *People v. Jones*, 36 Cal. 1784, c. 171. But there is an instance of a pardon granted to a person for homicide committed between the ages of two years. Reg. 300.

cretion, idiots and lunatics, (2) are not punishable by any criminal prosecution whatsoever.

(2) Idioty is a defect of understanding, from the moment of birth; *Go. Litt. 247. F. N. B. 370. 1 Comm. 304.* a person therefore, *from* deaf and dumb is *prima facie* within this definition. *B. Cor. 217. 1 Hale 34.*—Lunacy is a partial derangement of the intellectual faculties, the senses returning at uncertain intervals; the offender therefore is only protected from punishment for acts done during the prevalence of his disorder. *1 Hale 31. 4 Comm. 24.*—Madness is a total alienation of the mind. *1 Hale 30. 4 Co. 124.* These defects, whether permanent or temporary, must be unequivocal and plain, not in idle frolic humour, or unaccountable mode of action, but an absolute dispossession of the free and natural agency of the human mind. *8 St. Tr. 322. 1 Hale c. 4. O. B. 1784. p. 257.*

2 Roll. 324. F. Cor. 351. Reg. 309. Summ. 45. 3 Inst. 6. Co. Lit. 247. 4 Co. 124. 1 Hale 36, 37. 4 Comm. 25.—*Sett. 2.* Indeed it was anciently holden, in respect of that high regard which the law has for the safety of the king's person, that a madman might be punished as a traitor, (3) for killing or offering to kill the king; but this is contradicted by the later opinions.

26 Aff. 27. Stat. 57. Summ. 10. 1 Ark. 10. 109. 3 Inst. 4. f. 1 Hale 34, 35. 4 St. Tr. 225. 8 St. Tr. 285. 4 Comm. 24, 25, 388. *Sett. 3.* And it seems agreed at this day, that if one, who has committed a capital offence, become *non compos* before conviction, he shall not be arraigned; and if after conviction, that he shall not be executed.

Folk. 6. 27 Aff. 56. 1 The 12 Ann. c. 23. upon this subject which was inserted in the former edition is repealed by *17 Geo. 2. c. 20. f. 24.* *Sett. 4.* But by *17 Geo. 2. c. 5. f. 20.* (which seems agreeable to the ancient common law) it is enacted, "That it shall and may be lawful for any two or more justices of the peace where a dangerous lunatick shall be found, by warrant under their hands and seals, directed to the constables, churchwardens, and overseers or some of them, of the parish or place, to cause such lunatick so to be apprehended, and kept safely locked up in some secure place within the county, or precinct where the parish or place shall lie, as such justices shall under their hands and seals direct and appoint; and (if such justices find it necessary) to be there chained, if the last legal settlement of such person, shall be in any parish or place within such county or precinct; and if such settlement shall not be there, then such dangerous lunatick shall be sent to the last legal settlement by pass (*mutatis mutandis*) as aforesaid; and shall be locked up or chained by warrant of two justices of the county to which such person is so sent (4)."—And, by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatick, be such in truth or not, it shall be tried by an inquest of office, to be returned by the

(4) But this act relates only to vagrant lunatics who are strolling up and down the country, and does not extend to persons of rank and condition in the world, whose relations can take care of them properly by applying to the court of Chancery. *2 Atk. 52.*

Sheriff

sheriff of the county wherein the court sits; (5) and if it be found by them that the party only feigns himself mad, and he still refuse to answer, he shall be dealt with as one that stands mute. (6).

(5) Every person of the age of discretion is presumed of sane memory until the contrary appear, which may be either by the inspection of the court, 1 Hale 33. Tr. p. Pail 14. O. B. 1783. No. 4.—By evidence given to the jury, who are charged to try the indictment. 3 Bac. Abr. 81. 1 Hale 33. 35. 36. O. B. 1784. No. 288.—Or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a *verdict* awarded, returnable *instantly*, in the nature of an inquest of office. Foll. 46. Kel. 13. 1 Lev. 64. 1 Sid. 72. 4 Comm Appen. 1. 3. And this method, in cases of importance, doubt, or difficulty, the court will, in prudence and discretion, adopt. 1 Hale 35. Sav. 50. 56. 1 And. 154.

(6) By 12 Geo. 3. c. 20. in felony and piracy the judgment shall be the same, on standing mute, as if the prisoner had confessed the indictment or appeal.

Sec. 5. And if one who wants discretion commit a trespass against the person or possession of another, he shall be compelled in a civil action to give satisfaction for the damage.

289. Plow. 364. 2 Inst. 284. 414. Pop. 141. Brownl. 197. Noy 129. Co. Litt. 247. 1 Hale 15. 16. 20. 4 Comm. 22. 2 Comm. 291.

Sec. 6. And he who is guilty of any crime whatever, through his voluntary drunkenness, shall be punished for it as much as if he had been sober.

4 Comm. 26. 8 St. Tr. 285. 4 Co. 125. Dalt. c. 148.

Sec. 7. Also he, who incites a madman to do a murder or other crime, is a principal offender, and as much punishable as if he had done it himself.

Sec. 8. And if it appear by the circumstances, that an infant under the age of discretion could distinguish between good and evil, as if one of the age of nine or ten years kill another, and hide the body, or make excuses, or hide himself, he may be convicted and condemned, and forfeit, &c. as much as if he were of full age. But in such a case the judges will in prudence respite the execution, in order to get a pardon: and it is said, that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon, &c. (7)

(7) This authority to dismiss him must be understood of a reprieve before judgment, or that the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil. 1 Hale 27.

Sec. 9. As to the second point, viz. How far those are to be excused who are under the power of others:—A feme covert is so much favoured in respect of that power and authority which her husband has over her, that she shall not

1 Hale 45. 516. 2 vol. 320. B. Cor. 16. 108. Dalt. 134. 157. O. B. 1784. p. 119. 786.

B 2

suffer

suffer any punishment for committing a bare theft (8) in company with, or by coercion of, her husband.

(8) This exemption extends to burglary, 1 Hale 31. F. Cor. 109, and seemingly to robbery, as an offence of a more certainly not *per se* heinous. The reason of this is said to be "because the wife cannot know what property her husband may claim in the goods taken." 13 Mod. 65. If the true principles, the cases of robbery and burglary are in some measure distinguishable on this subject, but in burglary, the absence or presence of the party is immaterial, but in robbery, presence is an unavoidable and essential ingredient to the crime, and affords to the wife an opportunity of judging in what way to give the goods as taken.—*Fide, supra*, text, 11.

3 Inst. 168.
11 Mod. 65.
1 Hale 44.

Sec. 10. Neither shall she be deemed accessory to a felony for receiving her husband, who has been guilty of it, as her husband shall be for receiving her. (9)

(9) Not a principal, though the husband's offence be before, for she is *sub prelo* *sub*, and bound to conceal him. Neither is she affected by receiving, jointly with her husband, any other offence. 2 Hale 286. For she cannot be admitted as a witness to his own crime collaterally, her husband's guilt. Broom's 27. Dalt. 340. 1 Hale 301. O. B. 1735, p. 181.

Sum. 62, 66.
Dalt. 134.
F. Cor. 109.
383.
2 B. & C. 29, 111.
1 Hale 35, 316.
2 Comm. 129, were sole.
1 Hale 63.
Kel. 31.

Sec. 11. But if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion, of her husband, (10) she is punishable as much as if she

were sole.

1 Hale 31. S. P. C. 10, 17, 142. 4 Comm. 29. F. & O. B. 1735, No. 3.

(10) Covert is taken out of her own separate act, without the activity of her husband, or, if by, knowing that he has the house and makes her company; but if she is guilty, as a felony, 22 Ass. 49. Dalt. 134, for the offence which is imputed to her, even if by the command or presence of the husband, only a participation in law, or the offence itself may be repelled. 1 Hale 316. Therefore, no plea of covert shall avail, as to a participation of her husband in a treason or felony, for guilt, to be his, must go to the fact, and not to a plea, which is a subject, but forgotten to plea. In treason, also, the plea of covert is denied, because the offence is against the laws of the country, which shall never be contravened by the relationship of civil society. 4 Comm. 29.

2 Roll 16.
3 Keb. 34.
1 Salk. 410.
H. 1. 37.
Salk. 324.

Sec. 12. Also a wife may be indicted together with her husband, and condemned to the pillory with him for keeping a bawdy house; for this is an offence as to the government of the house, in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of her sex.

9 Co. 72.
C. J. 10, 322.
1 Sid. 210.
Mo. 813.
2 Keb. 311.
Hob. 95.
3 Keb. 34.

Sec. 13. And generally a feme covert shall answer as much as if she were sole, for any offence, not capital, against the common law, or statute, (and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband) she may be punished for it without the husband, by way of indictment, which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for an offence to which he is no way privy. And if a woman bring a malicious appeal for the death of her husband, known by her to be alive, she may be imprisoned for the false appeal, till she make fine to the king, and

3 H. 4. 173.
F. Cor. 109.
9. Inst. 1. 3.

Sum. 3. 4.
4 Comm. 42.

Secl. 2. But it is impossible to set down all the particular errors, which may properly be called heretical, concerning which there are, and always have been so many intricate disputes. However, the first of Elizabeth, which erected the high-commission-court, having restrained the same from adjudging any points to be heretical, which have not been determined to be such, either by scripture, or by some one of the four first general councils, or by some other council, by express words of scripture, or by the parliament, with the assent of the convocation; it has been since generally holden, that these rules will be good directions to ecclesiastical courts in relation to heresy.

3 Inst. 40.
Sum. 3.

B. Heresy
P. 151.
2 R. Abt. 226.

Secl. 3. As to the second point, *viz.* By whom heresy is cognizable, it is certain, that the convocation may declare what opinions are heretical: but it hath been questioned of late, whether they have power at this day to convene and convict the heretick.

F. N. B. 260.
Sum. 5.
1 H. 30.
Gil. 201. 210.
12 Co. 56. 57.
93.
3 Inst. 40.
2 St. Tr. 275.

Secl. 4. However it is agreed, that every bishop may convict persons of heresy within his own diocese, and proceed by church censures against those who shall be convicted; but it is said, that no spiritual judge, who is not a bishop, hath this power; and it has been questioned, whether a conviction before the ordinary were a sufficient foundation whereon to ground the writ *de hæretico comburendo*, as it is agreed that a conviction before the convocation was.

Secl. 5. By 24. Hen. 8. c. 9. the arch bishop of either province may cite any person before him for heresy, if the immediate ordinary either consent thereto, or do not his duty in punishing the same.

27 H. 8. 14.
2 Co. 28.
5. 1. 2.
1. 8. 1. C.
3 Inst. 39.
12 Rep. 56.
Frost. 219.
1 Salk. 175.

Secl. 6. But it is certain, that a man cannot be proceeded against at the common law, in a temporal court, merely for heresy; yet if in maintenance of his errors he set up conventicles and raise factions, which may tend to the disturbance of the publick peace, it seemeth that he may in this respect be fined and imprisoned, upon an indictment, &c. at the common law.

1 Hale, 290.
3 Inst. 42.
Sum. 4.
1 Roll. 110.
2 Bulst. 300.

Secl. 7. Also a temporal judge may incidently take knowledge whether a tenet be heretical or not; as where one was committed by force of 2 H. 4. c. 5. for saying, that he was not bound by the law of God to pay tithes to the curate; and another for saying, that though he was excommunicated before man, yet he was not so before God. The temporal courts, on an *habeas corpus* in the first case, and an action of false imprisonment in the other, adjudged neither of the points to be heresy within that statute; for the king's courts will examine all things which are ordained by statute.

5 Co. 2.
1 And. 115.

Secl. 8. Also in a *quare impedit*, if the bishop plead that he refused the clerk for Heresy, it seems that he must set forth
the

the particular point, that it may appear to be heretical, to the court wherein the action is brought, which having cognisance of the original cause, must by consequence have a power as to all incidental matters necessary for the determination of it; and, without knowing the very point alledged against the clerk, will not be able to give directions concerning it to the jury, who (if the party be dead) are to try the truth of the allegation.

• Sect. 9. But if a man be proceeded against as an heretick in the spiritual court *pro salute animæ*; and think himself aggrieved, his proper remedy seems to be to bring his appeal to a higher ecclesiastical court, and not to move for a prohibition from a temporal one, which, as it seems to be agreed, cannot regularly determine or discuss what shall be called heresy.

Sect. 10. As to the third point, *viz.* How heresy is punishable, there is no doubt but that at common law one convicted thereof, and refusing to abjure it, or falling into it again after he had abjured it, might be burnt by force of the writ, *de heretico comburendo*, which was grantable out of chancery upon a certificate of such conviction; but it is said, that he forfeited neither lands nor goods, because the proceedings against him were only *pro salute animæ*.

Sect. 11. But at this day the said writ *de heretico comburendo* is abolished by 29 Car. 2. c. 9. And all the old statutes which give a power to arrest or imprison persons for heresy, or introduced any forfeiture on that account are repealed. Yet by the common law, an obstinate heretick being excommunicate is still liable to be imprisoned by force of the writ, *de excommunicato capiendo*, till he makes satisfaction to the church. And by 9 & 10 W. 3. c. 32. "If any person having been educated in, or having made profession of the Christian religion within this realm, shall be convicted in any of the courts of *Westminster*, or at the assizes, of denying any one of the persons in the holy Trinity to be God, or of maintaining that there are more Gods than one, or of denying the truth of the Christian religion, or the divine authority of the holy scriptures, he shall for the first offence be adjudged incapable of any office; and for the second, shall be disabled to sue any action, or to be a guardian, executor or administrator; or to take by any legacy or deed of gift, or to bear any office civil or military, or benefice ecclesiastical, for ever, and shall also suffer imprisonment for three years, without bail or mainprize, from the time of such conviction."

CHAPTER THE THIRD.

OF WITCHRAFT.

3 Inst. 44.
Dalt. p. 513.
314.

OF offenders of this nature there are said to be three kinds.—First, conjurers, who by force of certain magicke words endeavour to raise the devil, and compel him to execute their commands.—Secondly, witches, who by way of friendly conference are said to bargain with an evil spirit to do what they desire of him.—Thirdly, forcerers or charmers, who by the use of certain superstitious forms of words, or by means of images, or other odd representations of persons or things, &c. are said to produce strange effects above the ordinary course of nature.

3 Inst. 44.
F. N. B. 269
Summ. 6.
S. P. C. 38.
C. Eliz. 571.

Sect. 2. All these were anciently punished in the same manner as hereticks, by the writ *de hæretico comburendo* after a sentence in the ecclesiastical court, and a relapse. And it is said also, that they might be condemned to the pillory, &c. upon an indictment at common law.

1 Hale 583.
45 E. 3. 17.
B. Cor. 13.

Sect. 3. In the time of king Edward the third, one taken with the head and face of a dead man, and a book of sorcery, was brought into the king's bench; because being no indictment against him, he was sworn that from thenceforth he would not be a forcerer, and then delivered from prison, and the head was burnt at his charge: but this method seems to be obsolete at this day.

2 Keb 719.

By 25 H. c. 3.
witchcraft and
sorcery were
made felony
without clergy.
45 E. 3. 17.
accusations of
were made felony.
1 Hale 7.
Sum. 6.
4 Inst. 43. con.

Sect. 4. By 1. Jac 1. c. 12 (the only law now in force against these offenders) they are divided into two degrees; and those in the first degree, and their accessories before, shall suffer as felons without clergy. Of these there are the four following species. *First*, Such as shall use any invocation or conjuration of any evil spirit: and such seem clearly to be within the law, tho' no spirit do actually appear.—*Secondly*, Such as consult, covenant with, entertain, employ, feed, or reward any evil spirit to any intent: and these are agreed to be within the statute, though nothing farther be done upon such consultation, &c.—*Thirdly*, Such as take up any dead person's body, or any part thereof, to be used in any manner of witchcraft: and these are also clearly within the statute, though they do not actually so use it.—*Fourthly*, Such as exercise any witchcraft, enchantment, charm, or sorcery, whereby any person shall be killed, destroyed, consumed, or lamed in his or her body, or any part thereof. But none are within this branch who do not actually effect such mischief.

2 Jon. 143.

Sett. 5. Those in the second degree shall for the first offence suffer a year's imprisonment, and the pillory; and for the second, as felons without clergy. And these, by the manifest purport of the words of the act, which is very obscurely penned, seem to be divided into the two following species: *First*, Such as take upon them by witchcraft, enchantment, ^{12 Mod. 556.} charm or sorcery to tell where treasure is to be found, or where things lost or stolen may be found, or to do any thing ^{Vide 4 Geo.} to the intent to provoke any person to unlawful love, or to hurt or destroy any person in his or her body, though the same be not effected. *Secondly*, Such as shall use any witchcraft, &c. whereby any cattle or goods of any person shall be destroyed, wasted or impaired: but those, who take upon ^{Som. 8. 3 Inst. 46.} them to do this, are not within the act unless they actually do it.

† But this statute of James is repealed by 9 Geo. 2. c. 5. which enacts, "That no proceeding shall be had against any person for witchcraft, sorcery, enchantment or conjuration, or for charging another with such crimes; and that whoever shall pretend to exercise those acts, or shall undertake to tell fortunes, or pretend by crafty science to discover stolen goods, shall be imprisoned for one year, stand four times in the pillory, and find sureties as the court shall think fit." Also by 17 Geo. 2. c. 5. "All jugglers, fortune tellers, gypsies pretending physiognomy, palmistry, or the like crafty science, shall be deemed rogues and vagabonds, and suffer as the act directs."

CHAPTER THE FOURTH.

OF SODOMY.

Horrendum illud peccatum!!!

ALL unnatural carnal copulations, whether with man or ^{12 Co. 36, 37.} beast, seem to come under the notion of sodomy, which ^{3 Inst. 58.} was felony by the antient common law, and punished, according to some authors, with burning; according to others, ^{Puff. ch. 3. Farfesc. 91.} with burying alive: but at this day by force of 25 H. 8. c. 6. & 5 Eliz. 17. is punished in the same manner as other felonies, which are excluded from clergy. (1).

(1) According to Britton b. 6. c. 9. these unnatural offenders were on conviction committed to the flumer. Fleta b. 6. c. 35. buries them alive within the earth, and the Mitrour c. 1. 1. 14. consigns them, with just indignation, to shameful and eternal oblivion.

Sett. 2. In every indictment for this offence, there must be ^{12 Co. 36, 37.} the words *ven habuit veneram. & carnaliter cognovit*; and ^{3 Inst. 58.} ^{Qu. 1 Hale 678.} ^{670. See vide} ^{15. Tr. 188.} ^{Dulley's case 1721.} ^{Hollis's case, at Lincoln, 1781.} ^{Prentice's case, Admiralty Sent. 1700.}

consequently

consequently some kind of penetration, and also of emission, must be proved; but any the least degree is sufficient, and emission is *prima facie* an evidence of penetration.

† By the 22 Geo. 2. c. 33. s. 19. "If any person, in his Majesty's fleet commits this crime, their aiders or abettors, they shall suffer death by court martial."

CHAPTER THE FIFTH.

OF OFFENCES AGAINST GOD NOT CAPITAL AT COMMON LAW.

3 Bar. Ab. 33.

OFFENCES more immediately against God not capital are either by the common law or statute. Those by the common law are,

1 Vent. 293.

3 Keb. 623.

2 Str. 834.

4 Comm. 59.

1 Black. 305.

Sec. 1. All blasphemies against God, as denying his being or providence, and all contumelious reproaches of Jesus Christ.

11 Mod. 142.

Str. 416. 788.

811.

1 Bar. K. B. 20. 1 Burn. 225. 4 Comm. 41. 3 Burn E. L. 201. Fitzg. 65.

Sec. 2. All profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule.

1 St. Tr. 802.

1 S. L. 168.

1 Keb. 620.

Sec. 3. Impostors in religion, as falsely pretending to extraordinary commissions from God, and terrifying or abusing the people with false denunciations of judgments, &c.

Can. 109.

Dalt. 124.

2 Haw. 61.

1 Haw. 152.

Sec. 4. All open lewdness grossly scandalous, such as was that of those persons, who exposed themselves naked to the people in a balcony in Covent-garden with most abominable circumstances.

1 Vent. 293.

3 K. b. 621.

Fov. 208.

1 Sid. 168.

Scobell 121.

4 Comm. 63, 65.

Str. 776.

788.

Ld. Ray. 451.

Sec. 5. Offences of this nature, because they tend to subvert all religion or morality, which are the foundation of government, are punishable by the temporal judges with fine and imprisonment, and also such corporal infamous punishment as to the court in discretion shall seem meet, according to the heinousness of the crime.

2 R. Abr. 187.

C. Jac. 44. 421.

Sec. 6. Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace; as these, your religion is a new religion, and preaching is but prattling, and prayer once a day is more edifying.

CHAPTER THE SIXTH.

OF OFFENCES, AGAINST RELIGION.

OFFENCES, by statute, not capital, more immediately ^{4 Comm. 63.} against God, are either such as are against religion in general; or against the established church.

Those against RELIGION IN GENERAL, are of several kinds.

Stat. 1. First profanation of the Lord's Day.—By ²⁷ Hen. 6. c. 5. “all manner of fairs and markets upon feast days, or on *Sundays*, (the four Sundays in harvest excepted,) shall clearly cease, on pain of forfeiting the goods exposed to sale.” By ¹ Car. 1. c. 1. “there shall be no meetings, assemblies, or concourse of people out of their own parishes on the Lord's day.—Nor any bear, beating, bull-baiting, interludes, common plays, or other unlawful exercises and pastimes used by any person or persons within their own parishes, (a) on pain of forfeiting 3*s.* & 4*d.* (a) This act impliedly authorizes innocent recreations, within the respective parishes, after divine service is over. ⁴ Comm. 63. “to the poor for every offence, on conviction, before a magistrate, on view, confession, or the oath of one witness, “to be levied by distress, or, in default, to be set three hours in the stocks.” By ³ Car. 1. c. 2. “no pack-horse, waggon, cart, wain, nor any drover with cattle, shall travel on the said day on pain of twenty shillings.—Nor shall any butcher (b) kill, or sell any victuals upon the said day on pain of 6*s.* 8*d.*” (b) This is no offence at common law, the

indictment therefore must conclude *contra formam statuti*. ^{Stranger} 172. But at sessions it is usual to indict for the nuisance in keeping open shop. C. C. C. 372.

† *Stat. 2.* By ²⁹ Car. 2. c. 7. “no tradesman, labourer, or other person, above the age of 14 years, shall exercise any worldly business, labour, or work of their ordinary callings on the Lord's day, (Works of necessity (c) and charity only excepted) on pain of forfeiting 5*s.* And no person shall publicly cry, shew forth, or expose to sale (d) any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord's day on pain of forfeiture. And by Par. 2. no drover, horse courser, waggon, butcher, higgler, or their servants, shall travel or come to his inn or (c) Therefore a baker may bake victuals for dinner for his customers, 2 Burn 785. But *quære*, as to puddings, pies, bread, and hot rolls, 11 Mod. 114. Cowper

640. But the offender cannot be convicted more than once for any number of acts on the same day. *Cripps v. Durden*. Trin. 17 Geo. 3. (d) By ¹ Jac. 2. c. 22. no shoe-maker shall expose to sale any shoes, &c. on pain of 3*s.* 4*d.* a pair.

Raymond 170.
3 Mod. 149.
2 Salk. 672.
1 Mod. 266.
C. C. 1072.
1 H. L. 30.
T. R. Reports,
205

This 70th law
penalty must be
served for within
six weeks.

Appointed by
the Watermen's
Company.

3 Mod. 59.
Sed. C. 330.
Sayer 304.
Strange 498,
608, 686, 999.
Bur. 150, 1036,
2267. Ld.
Rayn. 1368,
1376, 1387.
20 Modern 217.
1 Burn 401.

(a) In other
persons it is in-
terly optional.

4 Burn 209.

"lodging on pain of 20 s. Nor shall any person use, employ,
"or travel with any boat, wherry, lighter, or barge, without
"permission from a justice, on pain of 5 s. And if any person
"which shall travel, he then robbed, no hundred shall be
"charged. And no person upon the Lord's day shall serve any
"writ, process, &c. (except in cases of treason or felony,) but
"the same shall be void and the offender liable in damages." By 13 Geo. 3. c. 80. "no person shall on a Sunday or on
"Christmas day, kill any game, or use any gun, dog, net, or
"engine for that purpose, on pain from 10 l. to 20 l. for the
"first offence; from 20 l. to 30 l. for the second; and being
"committed for the third offence till the sessions, unless he give
"bail." By 21 Geo. 3. c. 4. "every place of publick en-
"tertainment or debating, opened upon any part of the Lord's
"day, to which admittance shall be had for money or tickets, or
"by charging an extraordinary price for refreshments, &c. shall
"be deemed a disorderly place, and the visible keeper shall for-
"feit 200 l. the chairman, 100 l. the person collecting the
"money or tickets, 50 l."

Sec. 3. But by 10 & 11 W. 3. c. 24. "Mackrell are per-
"mitted to be sold both before and after divine service, on
"Sundays." And fish carriages (by 2 Geo. 3. c. 15.) shall be
"allowed to pass whether laden, or returning empty. By 11 &
"12 W. 3. c. 21. "Forty watermen may ply on the Thames.
"And hackney coachmen and chairmen are permitted by 10
"Ann. c. 23. to work within the bills of mortality." By 29
"Car. 1. c. 7. "meat may be dressed and sold in inns, cook-
"shops, or victualling-houses." "And milk may be cried and
"sold, on the Lord's day, before 9 in the morning, and after
"4 in the afternoon."

Sec. 4. Secondly, Prophane cursing and swearing. By 13
"Geo. 2. c. 21. "if any person shall profanely curse or swear,
"and be convicted on oath of one witness, or by confession,
"or by the hearing of one magistrate, he shall forfeit, first,
"Every day-labourer, common soldier, sailor, or seaman, 1 s.—
"2dly, Every other person under the degree of a gentle-
"man, 2 s.—3dly, Every person of, or above the degree of a
"gentleman, 5 s. On a second conviction double; and for
"every other, treble the sum first forfeited, for the benefit of
"the poor; or being a labourer or gentleman, confined to
"hard labour for 14 days, or being a common soldier,
"or sailor in employ, set in the stocks for one hour, for
"every single offence, and two hours for any greater num-
"ber at the same time." The constable to make infor-
"mation if the offender be known to him; if unknown he
"is required to carry him before a justice. (a) The prosecution

N. B. This act directs the form of the conviction. Vide Burn's Just. 401.

must be within eight days. The act to be read in all churches after every quarter day. The magistrate neglecting his duty forfeits five pounds; the constable forty shillings, &c. And by 22 Geo. 2. c. 33. This offence committed in his Majesty's fleet, may be punished at the discretion of a court martial.

Sec. 5. Thirdly, Drunkenness, for which by 4 Jac. 1. c. 5. all persons whatsoever forfeit five shillings to the poor; and ~~for~~ which seamen may by 22 Geo. 2. c. 33. be punished by fine, &c. as the court martial shall think fit.

C. C. 29.
1 Bar. 3.
1 Edw. 6. c. 9.
7 Edw. 6. c. 10.
1 Edw. 6. c. 11.
1 Edw. 6. c. 12.

Sec. 6. Fourthly, Reviling the sacrament of the Lord's supper with contemptuous words, &c. for which by 1 Edw. 6. c. 1. which was repealed by 1 Mary c. 2. and revived by 1 Eliz. c. 1. the offender shall be imprisoned, fined, and banished.

4 Comm. 50.

1 By 1 Edw. 6. c. 21. "Whoever shall use the name of the Holy Trinity profanely or jestingly, in any stage play, interlude, or show shall be liable to a *quodam* penalty of ten pounds." By 1 Will. 3. c. 18. §. 17. "Whoever shall deny the true presence or writing, the doctrine of the blessed Trinity shall be liable to the penalty of the act for granting toleration, &c."

Sec. 7. I shall not mention the offences against 2 & 3 Edw. 6. c. 1. & 5. 1 Edw. c. 5. relating to falls and tilting, because they are already declared, that those statutes are enacted merely for political account, and it is much penal to offend that an offence of fall or tilting or both mentioned above, is necessary to be taken out, or that it is the favour of God.

CHAPTER THE SIXTH.

OF OFFENCES AGAINST THE COMMON PRAYER.

OFFENCES against the established church are, First, Such as concern all persons in general; Secondly, Such as more immediately relate to those of the Popish religion; Thirdly, Such as more immediately regard Protestant dissenters.—Those which concern all persons in general are, First, Against the Common Prayer. Secondly, In accepting or holding an office without due conformity to the church. Thirdly, In teaching school without conforming to the church. Fourthly, In not coming to church.

Sec. 1. And first of offences against the Common Prayer. As to which it is to be observed, That by 2 & 3 Edw. 6. c. 1. & 6. 1 Edw. 6. c. 1. which were repealed by 1 Mary 2. c. 2. and revived by 1 Eliz. c. 2. the Common Prayer Book, was first established

4 Comm. 50.
1 Edw. 6. c. 1.
1 Edw. 6. c. 6.
1 Edw. 6. c. 11.
1 Edw. 6. c. 12.
1 Edw. 6. c. 13.
1 Edw. 6. c. 14.
1 Edw. 6. c. 15.
1 Edw. 6. c. 16.
1 Edw. 6. c. 17.
1 Edw. 6. c. 18.
1 Edw. 6. c. 19.
1 Edw. 6. c. 20.
1 Edw. 6. c. 21.
1 Edw. 6. c. 22.
1 Edw. 6. c. 23.
1 Edw. 6. c. 24.
1 Edw. 6. c. 25.
1 Edw. 6. c. 26.
1 Edw. 6. c. 27.
1 Edw. 6. c. 28.
1 Edw. 6. c. 29.
1 Edw. 6. c. 30.
1 Edw. 6. c. 31.
1 Edw. 6. c. 32.
1 Edw. 6. c. 33.
1 Edw. 6. c. 34.
1 Edw. 6. c. 35.
1 Edw. 6. c. 36.
1 Edw. 6. c. 37.
1 Edw. 6. c. 38.
1 Edw. 6. c. 39.
1 Edw. 6. c. 40.
1 Edw. 6. c. 41.
1 Edw. 6. c. 42.
1 Edw. 6. c. 43.
1 Edw. 6. c. 44.
1 Edw. 6. c. 45.
1 Edw. 6. c. 46.
1 Edw. 6. c. 47.
1 Edw. 6. c. 48.
1 Edw. 6. c. 49.
1 Edw. 6. c. 50.

under severe penalties, but the same penalties being repeated and enlarged by 1 Eliz. c. 2. and 13 and 14 Car. 2. c. 4. which enacts the use of the same common prayer with some alterations, those statutes of Edward the sixth, seem, at this day, to be of little use.

Form of the indictment,
3 Mod. 78.

Sett. 2. By 1 Eliz. c. 2. s. 4, 5, 6. "If any parson, vicar or other whatsoever minister, that ought to say the said Common Prayer, &c. shall refuse to use it in such church, &c. or other place where he should use to minister the same, or wilfully or obstinately standing in the same, use any other form, or speak any thing in derogation of the said book, or any thing therein contain'd, he forfeits for the first offence one year's profit of all his spiritual promotions, and shall suffer six months imprisonment; and for the second offence shall be deprived, &c."

Dyer 203.
1 Lev. 295.

Sett. 3. In the construction of this act it has been resolved. First, that under the words, "Parson, vicar, or other whatsoever minister, that ought or should say the said Common Prayer, &c." those clergymen who have no cure are included, as much as those who have one, and that they are punishable for using any other form, &c. inasmuch as by their ordination they are obliged to officiate in the offices of the church, &c. and it is said that they are sufficiently shewn to be in holy orders by the word *clericus* in an indictment.

Gib. 269.
5 Co. Cawdry's
Case, 5, 6.
Pop. 50.
2 R. Abr. 222.

Sett. 4. Secondly, that this statute being not only in the affirmative, but also expressly saving the jurisdiction of ecclesiastical courts, does not restrain them from proceeding against these offenders in their own methods, as disturbers of the unity and peace of the church; and consequently that such persons may be deprived by the said court according to the course of the spiritual law, for the first offence.

Rule 7 & 8 Sec-
tions of this act.
The 13 & 14
Car. 2. c. 4.
enforced by
5 Ann c. 5.
and 22 Geo. 2.
ch. 33—
2 Shower 51.

Sett. 5. Also it is further enacted, by 1 Eliz. c. 2. s. 9. "That if any person shall in plays, songs, or other open words, speak any thing in derogation, depraving or despising of the said book, &c. Or by open fact compel, or otherwise procure or maintain any minister to say any Common Prayer openly, &c. in other form: or shall by any of the said means let any minister to say the said Common Prayer, &c. he shall forfeit one hundred marks for the first offence, and four hundred for the second, &c. (which if he pay not within six weeks after conviction, he shall suffer six months imprisonment for the first offence, and twelve for the second) and for the third offence shall forfeit all his goods and chattels, and shall suffer imprisonment for life."

Sett. 6. It has been made a question in the construction of this clause, whether if the party die within six weeks, the said forfeiture be not discharged, since by the act of God the election of paying it, or suffering imprisonment in lieu of it, is taken away.

CHAPTER THE EIGHTH.

OF OFFENCES IN ACCEPTING OR HOLDING AN OFFICE WITHOUT DUE CONFORMITY TO THE CHURCH.

OFFENCES in accepting or holding an office, without due conformity to the church, are of two kinds. First, in not receiving the sacrament both before and after the acceptance of an office. Secondly, in going to any other place for religious worship, than church during the continuance in an office. 4 Comm. 57.

Stat. 1. As to the first of these offences, it is enacted by 13 Car. 2. st. 2. c. 1. s. 10. 12. "That no person shall be placed, elected or chosen, to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common-council-man, or other office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque port or other port town, who shall not have received the sacrament, according to the rights of the church of England, within one year next before such election; and that every person, so placed or elected, shall take the oaths of allegiance and supremacy, at the same time when the oath for the due execution of the said office, &c. shall be administered; and that the said oaths shall be administered and tendered by those who administer the oath of office, and in default of such, by two justices of the peace of the corporation, &c." Which makes it necessary in a return to a *mandamus*, setting forth that the party did not take the oaths before the mayor, &c. to add, that he did not take them before two justices of peace, &c. And it is further enacted, "That on default hereof, every such election, placing and choice shall be void." And it hath been adjudged to be no excuse, that the oaths were not tendered. 2 Vent. 247.

† But now by 5 Geo. 1. c. 6. for establishing the peace and quiet of corporations, it is enacted, "That all persons required to take the said oath, or subscribe the said declaration, shall be confirmed in their respective offices, and be free from all incapacities and penalties; and none of their acts shall be questioned, notwithstanding their omission to take the oath, or subscribe the said declaration.—And that so much of the said act as requires the taking or subscribing the same is repealed." And it is further enacted, "That all persons in the actual possession of any office that were required by the above act, to take the sacrament within one year

5 Mod. 316.

2 Jon. 121.

8 And 3 Burn

249.

"year next before their election into such office shall be confirmed in their respective offices, and be discharged of all incapacities, and none of their acts shall be questioned, notwithstanding their omission to take the sacrament as aforesaid, nor shall they be removed by the corporation, or otherwise prosecuted for or by reason of such omission, unless such person be so removed, or such prosecution commenced within six months after the election" (1)

(1) If neither of these events have happened within the time limited, the election becomes absolute and unavoidable. 1 Black 279. Burr. 1714. Comp. 530, 540. for the statute operates as a protection to the possessor and not as a bar to the remedy. *Id. infra* N. (2)

Ch. 24. f. 7. † However by 1 Geo. 1. st. 2. f. 13, amended by 2 Geo. 2. c. 31 and 9 Geo. 2. c. 26. "All persons who bear any office, civil or military, &c. shall take the oaths, therein recited, of allegiance and supremacy (a); and the oath of abjuration (b). Also all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

(a) As recited 6 Geo. 2. c. 53. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

(b) As recited 1 W. & M. c. 1. f. 4. 5. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

(c) As recited 25 Car. 2. c. 2. f. 9. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

1 Burr. 292. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

306. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

4 Burr. 2132. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

3 Burr. 257. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

4 Mod. 243. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

1 Geo. 1. st. 2. f. 13. post. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

Ch. 24. f. 7. "Allo all persons who were before, shall still continue, obliged to receive the sacrament. And subscribe the declaration against transubstantiation (c). And by 11 Geo. 1. c. 4. f. 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths, by law required, at the time of their admission into such office, before such officer as shall preside at such election."

Sett. 2. Also it is enacted by 25 Car. 2. c. 2. "That all offices, civil and military, except those of inheritance, appointing sufficient deputies, and all who have any fee, &c. by patent from the king, except such as shall be granted for valuable consideration for life or years, and not relate to any office or place of trust, and also all who have any place of trust, or any employment in the king's household, shall take the oaths of allegiance and supremacy, and test,

(2) For various decisions upon the corporation and of itself as they respect the conduct of protestant dissenters see the King v. Read, 2 Mod. 293. Mayor of Guildford v. Clerk 2 Ventris 238. The King v. Laxwood, 3 Burr. 574. 4 Mod. 250. Salk. 171. Cuthbert v. G. and the King v. Groveson, Str. 1193. But in the case of Hamilton, Chancery 101 and 110 and Evans in 1761 the question was very elaborately determined by 1 S. the corporation of London, by a bye law, imposed a fine of six hundred pounds, upon every person, who, being elected, should refuse to serve the office of sheriff.—The plaintiff pleaded debt, in the said court, against the defendant for this penalty. The defendant pleaded the 13 Car. 2. averring that he was a protestant dissenter within the toleration act, 1 & 2 W. & M. c. 18. of scrupulous conscience; and therefore had not received the sacrament. The plaintiff replied the 5 Geo. 1. c. 6. which confirms members of corporations in their respective offices, although they have not received the sacrament according to the direction of the 13 Car. 2. To this replication the defendant demurred; and judgment was given upon it in favour of the city. The defendant appealed to the court of hustings, where the judgment was affirmed. A special commission of error was sued out by the defendant directed to Wides, Parker, Foster, Bathurst, and Wilmet; and, after great argument and deliberation, the judgment of the sheriff's court, and the affirmation by the court of hustings, were unanimously reversed. The plaintiff brought a writ of error in parliament; and on the 4th February 1767, Lord Mansfield, with five other judges against Parker, were of opinion, that, upon the facts admitted by the pleading in this case, the defendant Evans, should be allowed to object to the validity of his election to the office of sheriff, in bar to the present action; by reason that he had not taken the sacrament within the time limited. Append. to Feneaux Letters. 2 Linn. Ecc. L. 168. Comp. 533, 535.

"the next term, in the King's Bench, or Chancery, or Quarter-Sessions, and receive the sacrament within three months, and give in a certificate thereof, proved by two witnesses, to the court wherein they take the said oaths. And in case of neglect, shall be disabled to hold the said offices, &c. and forfeit five hundred pounds, except a man covert, &c."—But it hath been adjudged, that the persons so disabled lose only their right to the profits of their offices from the time of such disability; but that they lose nothing vested in them before. Also, it hath been adjudged to be no excuse for a person bound by law to accept a corporation office, that he is disabled to receive the sacrament, by having been excommunicated.—And *quære*, if it be any excuse, that his conscience will not suffer him to take it, being a protestant dissenter, &c. *Vide* note 2. p. 16.

1 Inst. 211.
2 Inst. 299.
4 Inst. 9.
C. 116. 115.
Law 40.
Ant. 207.

Sec. 3. Notwithstanding the words of the first of these acts are so very strong as to make such election, &c. void, and those of the second to make such persons disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said office; yet it hath been strongly holden, that the acts of one under such a disability, being insisted in such an office, and executing the same without any objection to his authority, may be valid as to strangers. For otherwise not only those who no way infringe this law, but even those whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they are no way privy; and one chafin in a corporation happening thro' the default of one head officer would perpetually vacate the acts of all others, whose authority, in respect of their admission into their offices, or otherwise, may depend on his.

1 Keb. 6-6.
663, 669, 721.
2 Jon. 21, 117.
2 L. R. 124, 242.
2 W. 2. 103.
3 L. 2. 110.

Sec. 4. By 25 Car. 2. c. 2. s. 17. it is expressly provided, that "The said act shall not extend to constables or churchwardens, or such like inferior civil officers, or to a bailiff of a manor or lands, or such like private officers."

5 M. 2. 435.
2 Inst.
V. 1. 3. B. 1.
25 Car. 2. c. 2. s. 17.
1. 22.

But it hath been questioned, whether it extends to the censor of the college of physicians.

Sec. 5. As to the second offence of this kind, viz. that of going to any other place for religious worship than the church, during the continuance of an office, it is enacted, by 5 Geo. 1. c. 4. "That if any mayor, bailiff, or other magistrate, in England, Wales, Berwick upon Tweed, Jersey or Guernsey, shall knowingly or wilfully resort to, or be present at any publick meeting, for religious worship, other than the church of England, as by law established, in the gown or other peculiar habit, or attended with the ensign or the ensigns, of or belonging to such his office, that every such mayor, bailiff, or other magistrate, being thereof convicted by due course of law, shall be disabled to hold such office, or employments, and shall be adjudged incapable to bear any public office or employment what-

(71) 10 Ann.
c. 2. recited in
the 10 Geo. 1.
c. 1. s. 1. rep. in
the 5 Geo. 1.
c. 4.)

4 Comm. 54.

“soever within England, Wales, Berwick upon Tweed,
“Jersey, or Guernsey.”

CHAPTER THE NINTH.

OF OFFENCES IN TEACHING SCHOOL
WITHOUT CONFORMING TO THE CHURCH.

AS to the offence of teaching school without conforming to the church, so far as it concerns all persons in general, it is enacted by 23 Eliz. c. 1. l. 6, 7. “That if
“any person or persons, body politick or corporate, shall
“keep or maintain any school-master, who shall not repair
“to church according to the form of the said statute, or
“be allowed by the bishop or ordinary of the diocese,
“who shall not take any thing for the said allowance they
“shall forfeit for every month ten pounds; and such school-
“master presuming to teach contrary to the said act, and
“being thereof convicted, shall be disabled to be a teacher
“of youth, and shall suffer imprisonment, without bail or
“mainprizes for one year.”

Sec. 2. And it is further enacted by 1 Jac. 1. c. 4. l. 9.
“That no person shall keep any school, or be a school-
“master, out of the universities or colleges of this realm,
“except it be in some publick or free grammar-school, or in
“some such noblemen’s, or noble woman’s, or gentleman’s, or
“gentle woman’s house, as are not recusants, or where the
“same schoolmaster shall be specially licenced thereto by the
“archbishop, bishop or guardian of the spiritualities of that
“diocese, upon pain, that as well the school-master, as also
“the party that shall retain or maintain any such school-
“master, contrary to the meaning of the said statute, shall
“forfeit each of them, for every day so wittingly offending,
“four shillings.”

1 Sec. 3. But it having been doubted whether such persons as are within the benefit of 1 William & Mary, c. 18. commonly called *the Toleration Act*, are not exempted from the penalties of the above-mentioned statutes, it was explained by 12 Anne, st. 2. c. 7.—But this act being repealed by 5 Geo. 1. c. 4. the operation of the act of toleration is consequently revived, by which it is enacted “that neither
“the 23 Eliz. c. 1. nor any other law or statute of this
“realm, made against papists, or popish recusants, except
“25 Car. 2. c. 2. and 30 Car. 2. st. 2. c. 1. shall be
“construed to extend to any person dissenting from the church
“of England that shall take the oaths mentioned in the
“first of William and Mary, and subscribe the declaration
“mentioned in the 30 Car. 2. c. 1.”

CHAPTER THE TENTH.

OF OFFENCES IN NOT COMING TO CHURCH.

FOR the better understanding of the offences of not coming to church, so far as the same relate to all persons in general, except such as are within the indulgence of 1 William & Mary, c. 18. which is commonly called *The Toleration Act*, I shall consider,—First, How far persons are punishable for their own absence from the church.—Secondly, how far they are punishable for suffering such absence in others.

In order to shew how far persons are punishable for their own absence, I shall consider the following particulars: First, What forfeitures of money, lands or goods, such offenders incur. Secondly, In what manner they are to be proceeded against for those forfeitures. Thirdly, What other inconveniencies they are subject unto. Fourthly, By what means they may be discharged.

As to the first point, I shall consider, *First*, What forfeitures of money; and, *Secondly*, What forfeitures of lands and goods such offenders are liable unto.

The forfeitures of money, to which they are liable, are threefold; 1. That of twelve pence for the absence of one Sunday, or other holy-day. 2. That of twenty pounds for the absence of every month contained in a conviction. 3. That of twenty pounds for the absence of every month after a conviction.

SECT. 1. And first, The forfeiture of twelve pence for the absence of one Sunday, or other holy-day, depends upon 1 Eliz. c. 2. by which it is enacted, “That all persons inhabiting within this realm, or any other the king’s dominions, shall diligently and faithfully, having no lawful or reasonable excuse to be absent, endeavour to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place, where common prayer and such service of God shall be used, in such time or let, upon every Sunday, and other days ordained and used to be kept as holy-days, and then and there to abide orderly and soberly, during the time of the common prayer, preaching, or other service of God, there to be used and ministered, upon pain of punishment by the censures of the church, and also upon pain that every person so offending shall forfeit for every such offence twelve pence.”

SECT. 2. In the exposition of this statute, the following opinions have been holden. *First*, That the indictment needs

8. 3 Jac. 4. 4. 1. 27, 28. this forfeiture may be levied by the churchwardens by distress by warrant of one justice.

2 Leon. 5.
Godb. 148.
29 Pl. c. 6. f. 5.
Gib. 291. 964.

not shew that the party had no reasonable excuse for his absence, or that he is an inhabitant within this realm, &c. But that the defendant, if he have any matter of this kind in his favour, ought to shew it.

2 Roll. 478. 455.
1 Inst. 159.
Gib. 358. 292.

Sec. 3. Secondly, That if the spiritual court proceeding upon this statute, refuse to allow a reasonable excuse, they may be prohibited; but that if they proceed wholly on their own canons, they shall not be at all controlled by the common law, (unless they act in derogation from it) as by questioning a matter not triable by them, as the bounds of a parish, &c. for they shall be presumed to be the best judges of their own laws.

1 Roll. 92.
1 Keb. 401.
Godb. 148.
Dalt. c. 45. f. 6.
16. 1 Sil. 311.
230. Gib. 202.
2 Ke. 121.

Sec. 4. Thirdly, That he who misbehaves himself in the church, or misses either morning or evening prayer, or goes away before the whole service is over, is as much within the statute as he who is wholly absent; and that he who is absent from his own parish church, shall be put to prove where he went to church.

1 And. 119.
Hob. 231.
2 Leon. 107.

Sec. 5. Fourthly, That the offence in not coming to church consisting wholly in a non-attendance, and not supposing any fact done, but barely the omission of what ought to be done, needs not be alledged in any certain place; for, properly speaking, it is not committed any where.

Price. c. 1. 103.
at 10. 10. 10. 10.
2 12. 2.

Sec. 6. Secondly, The forfeiture of twenty pounds for the absence of a whole month contained in a conviction, depends upon 23 Eliz. c. 1. f. 5. by which it is enacted "That every person, above the age of sixteen years, who shall not repair to some church, chapel, or usual place of common prayer, but forbear the same, contrary to the tenor of the said statute of 1 Eliz. ch. 2. and being thereof lawfully convicted, shall forfeit to the king, for every month which he or she shall so forbear, twenty pounds."

11 C. 1. 67.
1 B. 1. 94.

Sec. 7. In the exposition hereof it hath been resolved, *First*, That this statute, by inflicting twenty pounds for a month's absence, dispenses not with the forfeiture of twelve pence given by 1 Eliz. c. 2. for the absence of one Sunday; for both may well stand together, and the twelve pence is immediately forfeited upon the absence of each particular day.

Lutw. 162. 162.
11 C. 1. 67. 10.
1 Roll. 80. 9.
2 12. 2.
11 C. 1. 67.
3 B. 1. 77.

Sec. 8. Secondly, That these words, "being thereof lawfully convicted," are no more than the law would have implied, if they had not been expressed, and therefore operate nothing. From whence it follows, that they neither cause the party to forfeit any thing by a conviction, unless judgment be given thereon, nor restrain the forfeiture to such offences only, as are committed after a previous conviction, inasmuch as they mean no more than what the law provides of common right in every case, *viz.* That the party shall forfeit nothing till he be convicted.

11 C. 1. 67.
3 B. 1. 77.

Sec. 9. Thirdly, That he who is condemned on demurrer, or *nihil dicit*, is sufficiently convicted within the act; for who-

ever

even is adjudged, is convict, though it follow not that every one, who is convict, is adjudged, &c.

Stat. 10. Fourthly, That one, who was sick for part of the time contained in an information upon this statute, shall not be at all excused by reason of such sickness, if it be proved that he was a recusant, both before and after; for it shall be intended that he obstinately forbore during that time. C. Jac. 529.

Stat. 11. Fifthly, That the time of a month, intended by the statute shall be computed not by the kalendar, but by the number of days, allowing 28 days to each, according to the common rule of expounding statutes, which speak generally of a month. Yel. 100. Eliz. 835. 2 R. Ab. 521. Cawley 61.

A feme covert is within the 1 & 23 of Eliz. and an information lies against the husband. C. Jac. Sed. wide Sav. 25.

Stat. 12. Thirdly, The forfeiture of twenty pounds for the absence of every month after a conviction, depends upon 28th commonly called 29 Eliz. c. 6. f. 4. & 3 Jac. 1. c. 4. f. 8. 3. by which it is enacted, "That every offender being convicted of not coming to church, contrary to the purport of the statutes above mentioned, shall pay twenty pounds for every month after such conviction, until he shall conform himself, and come to church." 3 Lev. 433. Lut. 203. 1117. 2 Mod. 240. 1 And. 204. 11 Co. 63. 3 K. 742. 1 V. 143. 2 Ven. 711. 1. Ray. 117. 113. 371. 3. 121.

Stat. 13. As to the second branch of this head, viz. What forfeiture of lands and goods such offenders are liable to, the same depends also upon 29 Eliz. c. 6. f. 4. and 3 Jac. 1. c. 4. f. 8. 9. by which it is enacted, "That if the offender shall make default of payment of the twenty pounds, both for every month contained in the conviction, and also for every month subsequent, during which he shall not conform himself to the church, the king shall take, seize and enjoy all his goods, and two parts of his hereditaments, leases and farms, leaving the third part only of the same hereditaments, leases and farms, to and for the maintenance and relief of the same offender, his wife, children, and family, notwithstanding any prior conveyance thereof made by such offender, with power of revocation, or to the use of himself or his family." 29 Eliz. 6. f. 1, 8.

Also by the said statute of 3 Jac. 1. c. 4. f. 11. "The king may refuse the penalty of twenty pounds a month, though it be tendered according to law, and thereupon seize two parts of all the hereditaments, leases and farms, which at the time of such seizure shall be, or afterwards shall come to any such offender, or to any other to his use, or in trust for him, or at his disposition, or whereby or in consideration whereof he or his family shall be relieved, maintained or kept, leaving unto him his chief mansion-house, as part of his third part."

Stat. 14. In the construction of these statutes the following points have been resolved. *First,* That the king by making his election given him by 3 Jac. 1. to seize the offender's hereditaments, 1 Jones 24. 25. C. 171, 172.

Co. 1, 2.
1. 1. 18.
1. 1. 7.

Owen 37.
1 Leon. 97.
Cawl. 127.

C. 717. 845.
2 R. 41. 25.
Palm. 41.
W. June 25.

Jan 104, 106.
Caw. 100.
12 Co. 1, 2.

Lane 35.

As to the second general head of this chapter, viz. in what manner offenders of this nature are to be proceeded against for the forfeitures above mentioned, I shall consider, First How they are to be proceeded against for the said forfeitures of money. Secondly, In what manner for the said forfeitures of lands and goods.—As to the prosecution for the said forfeitures of money, I shall shew 1. How they are to be proceeded against for the said forfeiture of twelve pence for the absence of every Sunday, &c. and 2. In what manner for

for the said forfeiture of twenty pounds for the absence of every month contained in a conviction, and 3. In what manner for the said forfeiture of twenty pounds for the absence of every month after a conviction.

Sec. 19. And first, as to the recovery of the said forfeiture of twelve pence for the absence of every Sunday. It was enacted by 1 Eliz. c. 2. "That the same should be levied by the church-wardens of the parish where such offence should be done, to the use of the poor of the same parish, of the goods, lands, and tenements of such offenders, by way of distress:" But this being defective in not shewing by whom, or in what manner such offenders should be convicted, or by whom the warrant for levying the said forfeiture should be granted, it was further enacted by 3 Jac. 1. c. 4. s. 27. "That it shall be lawful for any one justice of the peace of the limit, division or liberty, wherein the said party shall dwell, upon the confession of the party, or the oath of one witness, to call the said party before him, and if he shall not make a sufficient excuse, and due proof thereof, to the satisfaction of the said justice of peace, that it shall be lawful for the said justice of peace to make a warrant to the church-warden of the said parish, where the said party shall dwell, to levy twelve pence for every such default, by distress and sale of the offender's goods, rendering the overplus to the said offender; and that in default of such distress, it shall be lawful for the said justice of peace to commit every such offender to prison, until the said forfeiture shall be paid, which shall be employed to the use of the poor of the parish, wherein the offender shall be resident or abiding at the time of the offence."

Sec. 20. As to the second point, viz. In what manner the said offenders are to be proceeded against for the said forfeiture of twenty pounds for the absence of every month contained in a conviction, I shall consider. First, In what manner the same may be recovered at the suit of the king. Secondly, In what manner at the suit of an informer.—And first, as to the recovery hereof at the king's suit, I shall consider. 1. In what manner it may be recovered at the king's suit by way of indictment. 2. In what manner by way of action or information.

Sec. 21. And first, as to the recovery hereof at the suit of the king by way of indictment, it was enacted by 23 Eliz. c. 1. s. 9. "That the justices of oyer, assize, gaol-delivery, and quarter sessions of the peace, might enquire of and determine these offences, within one year and a day:" But by 29 Eliz. c. 6. s. 2. it was ordained, "That all such convictions should be in the King's Bench, or at the assizes, or general gaol-delivery, and not elsewhere:" However by

1 R. II. c. 4.
11 Ed. I. c. 1.
1 Ed. II. c. 6, 67.
22, 83.

3 Jac. 1. c. 4. f. 7. the jurisdiction of the sessions is revived.

Stat. 22. Also it is farther enacted by 29 Eliz. c. 6. f. 5. and 3 Jac. 1. c. 4. f. 7. "That upon an indictment, at the assizes, gaol delivery, or general sessions of the peace, proclamation shall be made that the offender render himself to the sheriff before the next assizes, gaol-delivery or sessions; and that if he shall not then appear of record, upon such default recorded, the same shall be a conviction in law, as if a trial by verdict on the indictment had been recorded." And by f. 9. "Every such conviction shall be certified into the Exchequer, &c."

Stat. 23. In the construction hereof it hath been resolved, *First*, That such a conviction shall not be looked on as a judgment; for the words are, "It shall be a conviction in law, as if a trial, &c. had been recorded:" And consequently that it cannot be reversed by writ of error, which cannot be brought on any record, which is not a judgment, and therefore that the party has no other remedy against an insufficient conviction, but to remove it into the Exchequer, and quash it there. Also upon the same ground it has been holden, that a forfeiture due to the king, by force of such a conviction, shall not be taken to be within the exception of a general pardon, which excepts all forfeitures, &c. converted to a debt by judgment.

Stat. 24. Secondly, That if the proclamation do not pursue the statute, as if it appoint that the body shall be rendered at next sessions, &c. whereas by the statute it ought to order a tender to the sheriff, and that before the next sessions, the conviction is insufficient.

Stat. 25. Thirdly, That an actual personal appearance of the defendant at the next sessions, &c. will no way avail him, unless the same be entered of record.

Stat. 26. It hath been holden, That a man cannot be convicted by force of this statute upon a default on a proclamation, &c. in the King's Bench; because this court is not mentioned in the statute.—But perhaps this opinion may justly be questioned, because the court of King's Bench being the supreme court of assize, and gaol-delivery, &c. in the county where it sits, it seems that a statute, by giving any power to the courts of assize or gaol-delivery, does impliedly give the same to the court of King's Bench, unless it have some restrictive words to the contrary.

Stat. 27. If the defendant do appear, there is no doubt but that the proceedings ought to be according to the common course of law upon other indictments in all respects, except those which are within the restraint of 3 Jac. 1. c. 4. f. 16, 17. by which it is enacted, "That no such indictment, nor any proclamation, outlawry or other proceeding thereupon, shall at any time hereafter be avoided, discharged or reversed

“ reversed, by reason of any default in form or lack of form, C. Car. 504.
 “ or other defect whatsoever, (other than by direct traverse Raym. 434.
 “ to the point of not coming to church, &c.) but the same
 “ indictment shall stand in force and be proceeded upon; any
 “ such default of form, or other defect whatsoever notwith-
 “ standing, unless the party so indicted shall conform, &c.”

Sec. 28. However it hath been resolved, *First*, That the party is only restrained from taking advantage of defects in the record itself, and that he may plead any collateral matter, as a pardon, or *autrefois convict*, &c. 11 Co. 59. 65.
 1 Roll. 95.
 C. Jac. 480.
 482.

Sec. 29. *Secondly*, That he may even reverse a judgment after verdict for any such defect in the record itself, as tends to the king's prejudice, as the omission of a *capiat*, &c. C. Car. 504.
 505.
 Show. 309.
 5 Mod. 141.
 3 Keb. 591.
 And that he may reverse an outlawry for any common defect, upon putting in bail, and traversing the indictment as to the point of not coming to church, which is very agreeable to the purport of the whole clause, the latter part whereof seems manifestly to qualify the generality of the former.

Sec. 30. *Secondly*, As to the recovery of the said forfeiture by way of action or information at the king's suit, it was enacted by 35 Eliz. c. 1. s. 10. “ That all and every the
 “ said pains, duties, forfeitures, and payments, shall and
 “ may be recovered and levied to her majesty's use, by action
 “ of debt, bill, plaint, information or otherwise, in any of
 “ the courts commonly called the King's Bench, Common
 “ Pleas, or Exchequer, in such sort and in all respects, as by
 “ the ordinary course of the common laws of this realm, any
 “ other debt due by any such person in any other case should
 “ or may be recovered or levied, wherein no esoin, protec-
 “ tion or wager of law shall be admitted or allowed.”

Sec. 31. It is said, That the principal end of making this clause, was to enable the queen to proceed against the husband for the recufancy of his wife, which she could not do by virtue of any of the former statutes, by which she had no other way of proceeding but by indictment, and consequently could not charge the husband for the forfeiture of the wife, because she could not make him a party to the suit, as she may by force of this statute. However, it is said, that on a conviction of the wife upon an indictment, the lands and leases, which the husband has in her right, may be seized by the Exchequer-process. 11 Co. 61. 62.
 Vide sup. c. 1.
 s. 13.
 C. Jac. 482.
 Bridgm. 122.
 f. ems contrary.

Sec. 32. As to the second particular, *viz.* In what manner an informer may proceed for the forfeitures aforesaid. It is enacted by 23 Eliz. c. 1. s. 11. “ That all forfeitures of
 “ any sums of money limited by that act, shall be divided into
 “ three equal parts, whereof one third shall be to the queen,
 “ to her own use, one other third to the queen, for the relief
 “ of the poor in the parish where the offence shall be com- 2 Leon. 167.
 “ mitted, to be delivered by the warrant of the principal & 29 Eliz. 6. &
 “ officers in the receipt of the Exchequer, without further
 “ warrant

"warrant from her Majesty; and the other third to such person as will sue for the same, in any court of record, by action of debt, bill, plaint, or information, in which suit no essoin, &c. shall be allowed; and that every person which shall forfeit any sums of money by virtue of that act, and shall not be able, or shall fail to pay the same within three months after judgment thereof given, shall be committed to prison, there to remain until he have paid the same sums, or conform himself to go to church, and there do as is afore said."

Sect. 33. It has been objected, that this cause shall not extend to the said forfeiture of twenty pounds a month for not coming to church, because the same is by the former part of this statute given expressly to the queen, whereas the forfeitures for saying or hearing mass, and keeping an unlicensed school-master, are inflicted by the same statute indefinitely, and not expressly given to any one. From which it is argued, that this latter clause of distribution ought only to be applied to the said indefinite clauses, and not to take from the queen any part of that, which was expressly given her before. Yet it has been answered and resolved, that it shall equally extend to all; for the limitation of the forfeiture to the queen is mere surplus, and no more than the law would have implied, & *expressio eorum, quæ tacite insunt, nihil operatur.*

Sect. 34. Also it has been resolved, that an informer may sue, not only for the third part which belongs to him, but for the whole penalty in the behalf of himself and the king, and that the judgment shall be that they shall recover, &c.

Sect. 35. Also it has been adjudged, that neither the above mentioned clause of 29 Eliz. c. 6. which orders, That all convictions upon 23 Eliz. shall be certified into the Exchequer, and also that the offender shall pay to the queen twenty pounds for every month contained in the indictment, &c. nor the said clause in the 35 Eliz. c. 1. by which it is enacted, That all the said pains, &c. shall be recovered to the queen's use, do take away the suit of the informer, against one not proceeded against, by the king, or the third part of the penalty given him by 23 Eliz. For the plain purport of both these acts is to further the punishment of recusants, and therefore, inasmuch as they are in the affirmative, and consistent with 23 Eliz. they shall not be construed to abrogate any part of it.

Sect. 36. Moreover it is manifest, that 29 Eliz. c. 6. extends only to the king's suit by indictment, for the word indictment is mentioned almost in every clause.

Sect. 37. And it also follows from hence, that the second paragraph of the said statute, of 29 Eliz. which enacts, That convictions for this offence shall be only at assizes, gaol-delivery, or the King's Bench, restrains only convictions upon indictments, and consequently does not any way impeach the

11 Co. 59.
See 3 & 6 Pr.
1 R.

11 Co. 58.

1 Ard. 119,
110.
h. 2. c. 26.
1. 76.

Sup. f. 13. 33.

11 Co. 61. 62.
1. Roll. 92. 93.

Mob. 20 c.
Con. 11 Co. 57.

the jurisdiction of the Common Pleas or Exchequer, as to informations, &c.

Sec. 38. It seems the better opinion upon comparing all the books together, which differ much from one another both in stating the cases, and giving the reasons of the judgments relating to this matter, that a conviction at the king's suit, whether strictly regular or erroneous, may be pleaded to a suit by an informer, because, while it stands in force, it makes the party liable to the forfeiture of twenty pounds a month, and no one ought to be punished twice for the same offence. But it hath been resolved, that an erroneous, and strongly holden, that a regular conviction, by proclamation cannot be pleaded to a new suit by the king, because such a conviction is of no greater effect than a conviction by verdict, and consequently the king may wave it and begin anew.

Sec. 39. But it seems very doubtful, whether the conviction of a feme covert upon an indictment can be pleaded to an information against her and her husband, because the husband is not liable to pay the forfeiture recovered upon an indictment.

Sec. 40. It seems that the ordinary method of recovering the said forfeiture of twenty pounds for every month contained in a conviction, either at the suit of the king, or of an informer, may sufficiently appear from what has been already said; but there is an extraordinary remedy provided by the same statute of 29 Eliz. c. 6. to enforce the party to take care of the payment of the forfeiture of the twenty pounds for every month contained in an indictment, whereon he shall be convicted, by making his lands and goods liable to be seized by the king for the non-payment thereof into the Exchequer, upon such of the terms of Easter or Michaelmas, as shall be next after his conviction. But this extends not to a conviction by way of action, or information, as more fully appears from the two next sections.

Sec. 41. As to the third point, viz. in what manner the forfeiture of twenty pounds for the absence of every month after a conviction is to be recovered. It seems needless to enquire how far it may be recovered by an action or information for it at the king's suit, inasmuch as the said statutes of 29 Eliz. c. 6. & 3 Jac. 1. have made a most effectual provision for the payment of it, by expressly enacting, "That every such offender, being once convicted, shall for every month after such conviction, without any other indictment or conviction, pay into the Exchequer twice in the year, viz. in every Easter and Michaelmas term, as much as shall then remain unpaid, after the rate of twenty pounds for every month after a conviction, and that for a default herein the king may seize all the goods, and two parts of the hereditaments of such an offender, &c."

11 Co. 59. 65.
B. 2. c. 26. f.
63.
Lutw. 208.
1 Roll. 93.
C. Jac. 481.
Noy. 117.
Lanc. 60.
Paim. 39, 40,
41.
2 Roll. 108.
Bridge. 122.

C. Jac. 482.
Bridg. 120. 122.
2 Roll. 108.
Vide sup. c. 1.
f. 13.
1 Jac. Abi.
294.

Cawl. 102, 103.

Vile inf. f. 8.

Vile inf. f. 56.

Sec. 29 Fl. 6. f.
6.
3. J. 1. 1. c. 4. f.
7, 8, 9.
Cawl. 103, 104.

Sec. 42. But it seemeth that these clauses extend not to any conviction upon an information, or action, &c. but only to a conviction upon an indictment; for there is no other suit referred to besides that of indictment. Also it is said, that the said clauses extend to no convictions by verdict or otherwise, unless judgment be given thereon; because, till then nothing is forfeited. And from the same ground it seems to follow, that they would not have extended to a conviction by default upon proclamation, if there had been no other words in the statute to this purpose, than those by which it is enacted, "That such a default recorded shall be as sufficient a conviction in law of the said offence, whereof the party standeth indicted, as if upon the same indictment a trial by verdict thereupon had proceeded and been recorded," which words of themselves can by no means make such a conviction amount to a judgment after verdict, without which there can be no forfeiture upon any other conviction; and therefore it seemeth that the forfeiture caused by such a conviction must depend upon the other clauses of the said statutes, and the constant tenor of our law books, which seem to suppose that a person so convicted shall be liable to the said forfeitures, as much as one, against whom a judgment is expressly given.

Sec. 43. As to the second general branch of this head, *viz.* In what manner offenders of this nature are to be prosecuted for the forfeiture of lands or goods. It appeareth from the 13th, 14th, 15th, 17th, 18th, 40th and 41st sections of this chapter, that the king hath his election either to seize all the goods and two parts of the hereditaments and leases of the offender, upon his making default in the payment of twenty pounds, both for every month contained in an indictment, whereon, he shall be convicted, and also for every month subsequent, or else to refuse the said penalty of twenty pounds a month, and thereupon to seize two parts of the hereditaments and leases of the offender.

Sec. 44. It also appeareth from what hath been said in the forty-second section of this chapter, that the king hath this advantage of seizing the lands and goods of the offender upon no other conviction, but such as followeth an indictment, nor even upon such a conviction without a judgment, unless it be caused by a default upon a proclamation. Therefore I shall add no more to this head, except these two following observations:

2 Inst. 573.
3 Co. 169.
P. w. 436.

Sec. 45. *First,* That the king cannot seize the lands, till it appears by the return of an inquisition to that purpose to be awarded, of what lands, &c. the offender was seized, because the king's title to lands ought always to appear of record.

* *Sett.* 46. *Secondly*, That the king, according to the better opinion, may seize the goods, but not grant them over, without such an inquisition.

B. Cor. 2. 14.
25. 45. 47. 55
60.
1 Rol. 7.
2 R. Abt. 184.

Sett. 47. As to the third general head of this chapter, viz. What disabilities and other inconveniences, offenders of this kind are liable unto, it is enacted by 3 Jac. 1. c. 5. s. 8. "That no recusant convict shall practise either the common or civil law, or physick, or use the trade of an apothecary, or be judge or minister of any court, or bear any office in camp, troop, or company of soldiers, or in any ship, or fortrefs, but shall be utterly disabled for the same, and forfeit for every such offence one hundred pounds."

Sett. 48. Also it is farther enacted by the said statute of 3 Jac. 1. c. 5. s. 32. "That such recusants, as shall be convicted at the time of the death of any testator, or at the time of granting of any administration shall be disabled to be executors or administrators; and that no such persons shall be guardians to any child, &c."

Sett. 49. And it is enacted by 23 Eliz. c. 1. "That every person forbearing the church twelve months, shall on certificate thereof into the King's Bench by the ordinary, a justice of assize and gaol-delivery, or a justice of peace of the county where such offender shall dwell or be, be bound with two sufficient sureties in the sum of two hundred pounds at the least to the good behaviour, and so continue bound until such offender shall conform himself, &c."

Sett. 50. As to the fourth general head of this chapter, viz. by what means offenders of this nature may be discharged from the said forfeitures, &c. it is enacted by 23 Eliz. c. 1. s. 10. "That every person guilty of the above-mentioned offences, who shall, before he be thereof indicted, or at his arraignment or trial before judgment, submit and conform himself before the bishop of the diocese where he shall be resident, or before the justices where he shall be indicted, arraigned, or tried, (having not before made like submission at any his trial, being indicted for his first like offence,) shall upon his recognition of such submission in open assizes, or sessions of the county where such person shall be resident, be discharged of all and every the said offences against the said statute, &c."

Sett. 51. Also it is enacted by 29 Eliz. c. 6. s. 6. "That whosoever any such offender shall make submission, and become conformable, according to the term limited by the above mentioned statute of 23 Eliz. c. 1. or shall fortune to die, that then no forfeiture of twenty pounds for any month, or seizure of the lands of the same offender, from and after such submission and conformity, or death, and full satisfaction of all the arrearages of twenty pounds
" monthly,

" monthly, before such seizure due or payable, shall ensue,
 " or be continued against such offender, so long as the same
 " person shall continue in coming to divine service, accord-
 " ing to the intent of the said statute."

Sett. 52. But this statute being thought not to give sufficient encouragement to such persons to conform to the church, because by the most favourable construction that could be made, it still obliged them to pay such debts as were due to the king by force of a judgment, it was enacted by 1. Jac. 1. c. 4. s. 2. " That a recusant, conforming himself according
 " to the meaning of the above mentioned statutes, &c. shall,
 " during such conformity, be discharged of all penalties, which
 " he might otherwise sustain by reason of his recusancy."

Sett. 53. And it hath been resolved, that such conformity may, by force of this statute, be pleaded, as well to the suit of an informer as to that of the king; and that after judgment it will be a good ground for an *audita querela* against an informer; and also may be pleaded against the king before execution awarded.

Sett. 54. However, there seems to be no remedy for such a person to get a restitution of such of the profits of his lands, as have been actually taken by the king.

Sett. 55. It seemed very doubtful, before 1 Jac. 1. c. 4. how far the lands of an heir were chargeable with the forfeitures incurred by his ancestor in respect of his recusancy; but this seems to be for the most part cleared by the 3d, 4th and 5th paragraphs of that statute, by which it is enacted, " That the heir, if he be no recusant, or were such, any!
 " conform, shall be freed from all penalties happening upon
 " him by reason of his ancestor's recusancy, unless the two
 " parts of the lands were seized by the king in the ancestor's
 " life, in which case they shall continue in the king's hands
 " till the whole debt shall be levied. But it is farther en-
 " acted, that the king shall not extend the other third part
 " of the lands for the said penalty."

Sett. 56. It seems by the manifest purport of this statute, that the heir of a recusant, being also a recusant himself, has no remedy, but by conforming, to free his fee-simple lands from any of the forfeitures incurred by the conviction of his ancestor, whether the lands were seized in the ancestor's life or not.

However it is said, that the lands in fee-tail, which he claims from such ancestor, is no way chargeable after the death of the ancestor, with any forfeitures upon a conviction by proclamation (which has no greater effect than a verdict recorded) but only with such, as are due upon a judgment; which as it is agreed, charge an heir in tail by force of 33 Hen. 8. c. 39. s. 29. which makes an heir chargeable with the debts of his ancestor by judgement, recognizance, obligation, or other specialty. But perhaps, the authority of those opinions may justly be questioned.

For

1 Roll. 94.

Raym. 391,
 465.
 2 Jon. 187.
 1 Mod. 213.
 1 Roll. 95.
 2 Bulst. 324.

Seril. 130.
 2 Show. 331.

Lane 92, 93.
 106.
 Casley 109.
 110.

Major 571.
 1 Roll. 94.
 C. Eliz. 326
 Cawl. 109, 110.
 150, 151, 154.

For though a conviction by proclamation amount not to a judgment, yet surely it cannot be inferior to an obligation. And, therefore, perhaps, the books cited in the margin are misreported in this particular; and the more proper distinction may be this; that an heir in tail is chargeable only with the forfeitures of those months, which are contained in the indictment itself, on which a judgment is afterwards given, or a conviction by proclamation recorded; and not for the months subsequent to such conviction, or proclamation, inasmuch as the first seem to be debts appearing of record, the latter not. And the same distinction seems applicable to such lands in tail of an heir who conforms, as were seized in the ancestor's life; but it is clear that such only of his lands as were so seized are in any case liable; whether he claim them in fee-simple or tail.

Vide sup. f. 29.

CHAPTER THE ELEVENTH.

OF THE OFFENCES OF SUFFERING OTHERS
TO BE ABSENT FROM CHURCH.

HAVING shewn how far all persons in general are punishable for their own absence from the church, I am now to shew how far they may be punished for the absence of others; as to which it is enacted by 3 Jac. I. c. 4. s. 32, 33, 34. "That whosoever shall retain or keep in his service, " fee or livery, or shall willingly maintain, retain, relieve, " keep, or harbour, in his house, any servant, sojourner, or " stranger (except a father, or mother wanting, without " fraud, or covin, other habitation, or sufficient maintenance, " and also except a ward, or person committed to the custody " of another by authority) who shall not go to some church " or chapel, or usual place of common prayer, to hear divine service, but shall forbear the same for the space of " one month, &c. shall for every month, that he shall keep " such servant, &c. forfeit ten pounds."

4 Can. 52.
3 Burn. E. L.
223.

CHAPTER THE TWELFTH.

OF POPISH RECUSANCY.

AND now we are come to offences against the established church more immediately relating to those of the popish religion.

For the better understanding whereof I shall consider: First, The above mentioned offence of not coming to church, so far as it particularly concerns those of this persuasion. Secondly, The offence of laying or hearing mass, or other popish service. Thirdly, The offence of not making

making a declaration against popery. Fourthly, The offence of promoting or encouraging the popish religion.

Skin. 99.

Kebl. 7.

3 Burn. E. L.

120.

And first as to the said offence of not coming to church, so far as it particularly concerns those of the popish religion; who in respect hereof are commonly called popish recusants. I shall consider; *First*, How far such recusants are punishable in their own persons. *Secondly*, How far they make others liable to be punished.

As to the first of these points, *viz.* How far such recusants are punishable in their own persons. It is to be observed, that they are not only liable to all the forfeitures and disabilities and other inconveniencies mentioned in chap. 10. but also to many particular disabilities, restraints and forfeitures, and other inconveniencies to which no others are liable.

First they are put under the following disabilities.
1. That of bringing an action. 2. That of presenting to a church. 3. That of bearing any public office, or charge. 4. That of claiming any part of a husband's personal estate. 5. That of claiming an estate by courtsey, or by way of dower, after a marriage against law.

Secondly, They are put under the following restraints. 1. From going above five miles from home. 2. From coming to court. 3. From keeping arms. 4. From coming within ten miles of London.

Thirdly, They are liable to the following forfeitures.
1. That of two parts of a jointure or dower. 2. That of twenty pounds for not receiving the sacrament yearly after conformity. 3. That of one hundred pounds for an unlawful marriage. 4. That of one hundred pounds for an omission of lawful baptism. 5. That of twenty pounds for an unlawful burial.

Lastly, They are subject to the following inconveniencies.
1. That their houses may be searched for reliques, whether they be men or women. 2. If they be women and married, that they may be committed, &c.

Sec. 1. As to the first of the said disabilities, *viz.* That of bringing an action. It is enacted by 3 Jac. 1. c. 5. f. 11, 12. "That every popish recusant convict shall stand to all intents and purposes disabled, as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws of this realm until he or she shall conform, &c. And that every person sued by such person so disabled, may plead the same in disabling of such plaintiff, as if he or she were excommunicated by sentence in the ecclesiastical court. Except the action of such recusant do concern some hereditament or

“ or lease, which is not to be seized into the king's hands 4 Comm. 55.
“ by force of some law concerning recusancy.” 124.

By 1 Jac. 1. c. 4. provided he conformeth according to the meaning of the Statutes of 23 Eliz. c. 1. and 28 Eliz. c. 6. he shall during such conformity, be discharged of all penalties which he might otherwise sustain by reason of his recusancy. For the pleading of which see Ray. 399. 2 Jones 127. Mod. 215.

Sect. 2. In the exposition hereof it hath been resolved, *First*, That the plea of such a conviction, like all other pleas in disability, ought to be pleaded before imparlance, and also to conclude with a demand if the plaintiff shall be answered.

Noy, 89.
3 Lev. 208.
Litch. 176.
Hec. 18. Mod.
Catesin L. & E.
43. 381.

Sect. 3. *Secondly*, That such plea ought also to shew before what justice the conviction was, that the court may know where to send for a certificate thereof, if it be denied, and also that the record itself, or at least a certificate thereof, ought to be immediately produced, according to the general rule of the law, as to all dilatory pleas grounded upon records.

Noy, 89.
Litch, 176.
3 Lev. 333.
234.

Sect. 4. *Thirdly*, That if after such a plea it be certified that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse and be convicted again, the defendant cannot plead the same in disability a second time.

Hec. 176.

Sect. 5. *Fourthly*, That it must appear either from the conviction itself, or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause; however that this is sufficiently set forth by alledging that the plaintiff being *populus recusans*, was indicted and convicted *secundum formam statuti, &c.*

2 Lut. 1117.
3 Lev. 333, 334,
11, 12.

Sect. 6. And some have gone so far as to hold, that all popish recusants convicted may be taken up by the writ, *de excommunicato capiendo*, and that they are not to be admitted as competent witnesses in any cause; but this seems to be a construction over severe: for inasmuch as this, like all other penal statutes, ought to be construed strictly, and the words thereof are no more than, that such persons shall stand disabled, &c. as persons lawfully excommunicate, &c. and the purport thereof may be fully satisfied by the disability to bring any action, it seems to be too rigorous to carry them farther.

2 Bul. 155, 156.
The same point seems admitted,
1 St. Tr. 268.
3 St. Tr. 425.
Cawley 216.
Vide 1 Com.
Dig. 10. as to
pleading, and
4 Com. Dig. 65.
as to the law in
general upon
this head.

Sect. 7. As to the second of the said disabilities, viz. That of presenting to a church, the same being at this day extended by 12 Ann. c. 2. to all persons making profession of the popish religion: I shall refer the reader, for the matters relating to this head, to chap. 15. wherein is shewn how penal it is, barely to profess the said religion: and I shall only take notice in this place, that by 1 Will. & Mar. c. 26. s. 4. “ If the trustee, mortgagee, or grantee of any avoidance
“ whereof the trust shall be for any popish recusant convicted, shall

3 Burn. E. L.
252.

"present without giving notice in writing of the avoidance, to the university, &c. within three months after the avoidance, he forfeits five hundred pounds."

25 Geo. 2. c.
30. f. 3.
20 Geo. 2. c.
53. f. 56.

Self. 8. As to the third of the said disabilities, viz. that of bearing any publick office or charge, it is enacted by 3 Jac. 1. c. 5. f. 9. "That no popish recusant convict shall exercise any publick office or charge in the commonwealth, but shall be utterly disabled to exercise the same, by himself or his deputy."

Self. 9. It is observable, that this clause is more strongly penned than that which immediately precedes it, relating to all recusants in general, as to the following particulars: 1. That this extends to all public offices and charges in general, whereas the former extends only to those which are particularly enumerated. 2. That this expressly disables a popish recusant to exercise such an office by himself or his deputy, but the other says nothing at all of the exercise of an office by a deputy.

See also 7 J. 2.
ch. 6.

Self. 10. As to the fourth of the said disabilities, viz. That of claiming any part of a husband's personal estate, it is enacted by 3 Jac. 1. c. 5. f. 10. "That every woman, being a popish recusant convict (her husband not standing convicted of popish recusancy) which shall not conform herself and remain conform'd, but shall forbear to repair to some church or usual place of common prayer, and there hear divine service and sermon, if any then be, and receive the sacrament of the Lord's supper, according to the laws of this realm, by the space of one whole year next before the death of her said husband, shall not only be disabled to be executrix or administratrix of her said husband, but also to have or demand any part of her said husband's goods or chattels, by any law, custom or usage whatsoever." And by 3 Jac. 1. c. 5. f. 13. "Every woman is put under the like disability, being a popish recusant, who shall be married otherwise than according to the church of England."

Vide the marriage acts 26
Geo. 2. c. 33.
and 24 Geo. 3.
c. 53.

Self. 11. As to the fifth of the said disabilities, viz. that of claiming an estate by the courtesy, or by way of dower, &c. it is enacted by 3 Jac. 1. c. 5. f. 13. "That every man who, being a popish recusant convict, shall be married otherwise than in some open church or chapel, and otherwise than according to the orders of the church of England, by a minister lawfully authorized, shall be disabled to have any estate, as tenant by the courtesy; and that every woman, being a popish recusant convict, who shall be married in other form than as aforesaid, shall be disabled to claim her dower or jointure, or widow's estate, &c."

Self.

Stat. 12. As to the first of the above mentioned restraints, viz. That from going above five miles from home, &c. it is enacted by 35 Eliz. c. 2. and 3 Jac. 1. c. 5. s. 6, 7. "That every popish recusant convict shall repair to his place of dwelling, &c. and not remove above five miles from thence, unless he be urged by process, &c. or have a licence from the privy council, &c. or under the hands and seals of four justices of peace, with the assent in writing of the lieutenant of the county, or of the bishop, &c. (every licence of which kind by justices of peace must express both the particular cause and the time for which it is given, and ought not to be granted without a previous oath of some reasonable cause,) under pain of forfeiting all his goods and hereditaments, (whether freehold or copyhold,) for his life, or of abjuring the realm, if he be not worth twenty marks a year, or forty pounds in goods, unless he recant before conviction, and also continue conformable."

3 Burn. E. L.
162. 165.

See Cawl. 128,
129, &c. 207,
208.

Stat. 13. Note, that the privy council may grant such licence without any special cause or oath, &c. but that the justices of peace cannot. And it hath been resolved, that in pleading a licence of justices of peace, you must expressly shew that it was made under their hands and seals, and also set forth the cause in particular for which it was granted, and the time for which it was limited, and that the party was sworn to the truth of such cause, &c.

C. Jac. 352.
1 Roll. 103.
Moor 836.

Stat. 14. It is said, that if the same person be both a justice of peace and a lieutenant, he cannot both join in a licence as justice of peace, and also give his assent as lieutenant, but can only act in one capacity.

C. Jac. 352.
1 Roll. 108.
Moor 836.

Stat. 15. It seems that the miles shall be computed according to the English manner, allowing 5280 foot, or 1760 yards to each mile, and that the same shall be reckoned not by strait lines, as a bird or arrow may fly, but according to the nearest and most usual way.

Cawl. 130, 131.
C. Eliz. 212.

Stat. 16. As to the second of the above mentioned restraints, viz. That which relates to the coming to court, it is enacted by 3 Jac. 1. c. 5. s. 2. "That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of one hundred pounds, &c." And it is farther enacted by 30 Car. 2. st. 2. s. 5, 6. "That every popish recusant convict, who shall come advisedly into, or remain in the presence of the king and queen, or shall come into the court or house where they or any of them reside, shall be disabled to hold or execute any office or place of trust civil or military, or to sue in law or equity, or to be an executor, &c. or capable of any legacy or deed of gift, and shall forfeit for every wilful offence five hundred pounds, unless such person do within

"the

"the term next after such his coming or remaining, take the oaths of allegiance and supremacy, and make the declaration against transubstantiation and the invocation of saints, &c. in the court of chancery."

Sect. 17. As to the third of the above mentioned restraints, viz. That which relates to the keeping of arms, it is enacted by 3 Jac. 1. c. 5. s. 27, 28, 29. "That all such armour, gun-powder, and munition, of whatsoever kinds, as any popish recusant convict shall have in his own house or elsewhere, or in the possession of any other at his disposition, shall be taken from him by warrant of four justices of peace at their General or Quarter Sessions, (except such necessary weapons as shall be allowed him by the said four justices, for the defence of his person or house) and that the said armour, &c. so taken, shall be kept at the cost of such recusant, in such place as the said four justices at their said sessions shall appoint: and that if any such recusant having such armour, &c. or if any other person who shall have any such armour, &c. to the use of such recusant, shall refuse to discover to the said justices, or any of them, what armour he hath, or shall let or hinder the delivery thereof to any of the said justices, or to any other person authorized by their warrant to take the same, that then every person so offending shall forfeit his said armour, &c. and also be imprisoned for three months without bail, by warrant from any justices of peace of such county." And it is further enacted, "That notwithstanding the taking away such armour, &c. yet such recusant shall be charged with the maintaining of the same, and with the providing of a horse, &c. in such sort as others of his majesty's subjects." Also it is further enacted by 1 W. & M. c. 15, "That no reputed papist refusing to make the said declaration against popery, mentioned in 30 Car. shall keep arms." As it is set forth more at large chap. 14. sect. 4.

Sect. 18. As to the fourth of the above mentioned restraints, viz. That which relates to the coming within ten miles of London, it is enacted by 5 Jac. 1. c. 5. s. 4, 5. "That no popish recusant, &c. shall remain within the compass of ten miles of London, under pain of one hundred pounds, except such persons as, at the time of the said act, did use some trade, mystery, or manual occupation in London, &c. and such as shall have their only dwelling in London, &c." Also reputed papists, refusing to make the declaration mentioned in the precedent sections are to be removed from London, &c. by force of 1 Will. & Mar. c. 9, which is set forth more at large in chap. 14. sect. 3.

Sec. 19. As to the first of the above mentioned forfeitures, viz. That of two parts of a jointure or dower, it is enacted by 3 Jac. 1. c. 5. f. 10. "That every married woman, being a popish recusant convict, (her husband not standing convicted of popish recusancy,) who shall not conform herself and remain conformed, but shall forbear to repair to some church or usual place of common prayer, and there to hear divine service and sermon, if any then be, and receive the sacrament of the Lord's supper, according to the laws of this realm, within one year next before the death of her said husband, shall forfeit to the king the profits of two parts of her jointure and dower of any hereditaments of her said husband, &c."

Sec. 20. As to the second of the above mentioned forfeitures, viz. That of twenty pounds, &c. for not receiving the sacrament yearly after conformity, it is enacted by 3 Jac. 1. c. 4. f. 2, 3. "That if any popish recusant convict, who hath conformed himself to the church, &c. shall not receive the sacrament in his own parish church, &c. within one year after his conformity, he shall forfeit twenty pounds, and for the second year forty pounds, and for every year after sixty pounds, &c."

Sec. 21. As to the third of the above mentioned forfeitures, viz. That of one hundred pounds for an unlawful marriage, it is enacted by 3 Jac. 1. c. 5. f. 13. "That every popish recusant convict, who shall be married to a woman who is no inheritor, otherwise than according to the church of England, shall forfeit one hundred pounds."

Sec. 22. As to the fourth of the above mentioned forfeitures, viz. That of one hundred pounds for the omission of a lawful baptism, it is enacted by 3 Jac. 1. c. 5. f. 14. "That every popish recusant who shall not cause his or her child to be baptized, within one month after its birth, by a lawful minister, &c. shall forfeit one hundred pounds, &c."

Sec. 23. As to the fifth of the above mentioned forfeitures, viz. That of twenty pounds for an unlawful burial, it is enacted by 3 Jac. 1. c. 5. f. 15. "That if any popish recusant, not being excommunicate, shall be buried in any other place than in the church or churchyard, or not according to the ecclesiastical laws of this realm, the executors, &c. of such recusant, knowing the same, or the party that causeth him to be so buried, shall forfeit twenty pounds, &c."

Sec. 24. As to the inconvenience to which all such offenders are liable, viz. That of having their houses searched for reliques, &c. it is enacted by 3 Jac. 1. c. 5. f. 26. "That any two justices of peace, and all mayors, bailiffs,

“ and chief officers of cities and towns corporate, in their
 “ respective jurisdictions, may search the house and lodgings
 “ of every popish recusant convict for popish books and re-
 “ liques; and that if any altar, pix, beads, pictures, or such
 “ like popish relique, or any popish book, be found in the
 “ custody of such person; as, in the opinion of the said jus-
 “ tices, &c. shall be unmeet for him or her to have or use, it
 “ shall be defaced and burnt, if it be meet to be burnt; and
 “ if it be a crucifix, or other relique of any price, the same
 “ shall be defaced at the General Quarter-Sessions in the
 “ county where it shall be found, and then restored to the
 “ owner.”

Sec. 25. As to the inconvenience to which such offenders, being femes covert are liable, viz. That of being committed, it is enacted by 7 Jac. 1. c. 6. s. 28. “ That if any married woman, being a popish recusant convict, shall not within three months after her conviction, conform herself, and repair to church and receive the sacrament, &c. she may be committed to prison by one of the privy council, or by the bishop, if she be a baroness; or if under that degree by two justices of peace, whereof one to be of the *Quorum*, there to remain till she perform, &c. unless the husband will pay to the king ten pounds a month for her offence, or else the third part of all his lands, &c. at the choice of the husband, &c.”

Sec. 26. And now I am to consider in the second place, how far such recusants make others liable to be punished; as to which it is to be observed, That the husband of a popish recusant convict is not only liable to the forfeiture of ten pounds a month for the absence of any of his servants from church, by force of 1 Jac. 1. which is set forth more at large in the foregoing chapter, but is also “ utterly disabled,” by the ninth paragraph of the said statute, “ to exercise any publick office or charge in the common-wealth by himself or by his deputy; (except such husband himself, and his children, which shall be above the age of nine years abiding with him, and his servants in the household, shall once every month at least, not having any reasonable excuse to the contrary, repair to some church or chapel usual for divine service, and there hear divine service; and the said husband, and such his children and servants, as are of meet age, receive the sacrament of the Lord’s supper, at such times as are limited by the laws of this realm, and do bring up his said children in the true religion.”)

Sec. 27. Also it is farther enacted by the said statute of 1 Jac. 1. c. 5. s. 1. 26. “ That the house of one whose wife is a popish recusant convict, may be searched by any two justices of peace, &c. for popish books, &c.”

CHAPTER THE THIRTEENTH.

OF OFFENCES IN SAYING OR HEARING MASS, OR OTHER POPIISH SERVICE.

AS to the offence in saying or hearing mass, it is enacted by 23 Eliz. c. 1. s. 4. "That every person, who shall say or sing mass, being thereof lawfully convicted, shall forfeit two hundred marks, and be committed to prison in the next gaol, there to remain by the space of one year, and from thenceforth till he have paid the said sum of two hundred marks; and that every person, who shall willingly hear mass, shall forfeit the sum of one hundred marks, and suffer a year's imprisonment." Dyer 203.
4 Comm. 56,
27. 215.

Stat. 2. And it is enacted by 11 & 12 Will. 3. c. 4. s. 2, 3, 4, 5. "That every person, who shall apprehend any popish bishop, priest, or jesuit, and prosecute him to conviction for saying mass, or exercising any other part of the function of a popish bishop or priest, shall receive one hundred pounds of the sheriff, and that every such popish bishop, &c. (except, being a foreigner, he be entered in the secretary's office, and officiate only in the house of a foreign minister,) shall be adjudged to perpetual imprisonment." 3 Jac. 1. ch. 5.
2 Shew. 216.

† But by 18 Geo. 3. c. 60. it is enacted "That the above-mentioned clauses of 11 & 12 Will. 3. are repealed," provided, by s. 5. "that such popish bishop, priest, jesuit or schoolmaster shall have taken and subscribed the oath, (in the words as recited in the said statute of Geo. 3.) before he shall have been apprehended, or any prosecution commenced against him,"

CHAPTER THE FOURTEENTH.

OF THE OFFENCE OF NOT MAKING A DECLARATION AGAINST POPERY.

THE offence of refusing to make a declaration against some of the principal doctrines of the popish religion puts all persons under the following restraints: First, From sitting in parliament. Secondly, From holding a place at court. Thirdly, From living within ten miles of London. Fourthly, From keeping arms. Fifthly, it puts them under a disability of professing to a church.

A witness shall not be put to answer whether he is or is not a Papist. Dougl. 593.

Stat. 1. As to the first of the above mentioned restraints, viz. That which relates to the sitting in parliament, it is enacted by 30 Car. 2. st. 2. c. 1. "That no peer shall vote or make his proxy in the House of Peers, or sit there during any debate; and that no member of the House of Commons, shall vote or sit there during any debate after the Speaker is chosen, until such peer or member shall take the oaths of allegiance and supremacy, and make a declaration of his belief that there is no transubstantiation in the sacrament of the Lord's Supper; and that the invocation or adoration of the Virgin Mary, or any other saint, and the sacrifice of the mass, as they are now used in the church of Rome, are superstitious and idolatrous, &c. on pain that every such offender shall be adjudged a popish recusant convict, and disabled to hold or execute any office, &c. or from thenceforth to sit or vote in either house of parliament, to sue in law of equity, or to be guardian, executor or administrator, or capable of any legacy or deed of gift, and shall forfeit for every wilful offence five hundred pounds."

1 Geo. 1. c. 11.

Stat. 2. As to the second of the above mentioned restraints, viz. That which relates to the holding a place at court, it is enacted by the said statute of 30 Car. 2. st. 2. s. 9. 12, 13. "That every person who shall be a sworn servant to the king, shall take the said oaths, and make and subscribe the said declaration in chancery, the next term after he shall be so sworn a servant, &c. And that if any such person, neglecting so to do, shall advisedly come into or remain in the presence of the king or queen, or shall come into the court or house where they are or any of them reside, he shall suffer all the penalties expressed in the foregoing section, unless such person so coming into the king's presence, &c. shall first have licence so to do, by warrant under the hands and seals of six privy counsellors, by order of the privy council, upon some urgent occasion therein to be expressed, which licence shall not exceed ten days, and shall be first filed, &c. in the petty-bag office, for any body to view without fee, &c. and no person be licensed for above thirty days in one year."

This clause is renewed by 2 Geo. 2. c. 31. s. 9.

Stat. 3. As to the third of the above mentioned restraints, viz. That which relates to the living within ten miles of London, it is enacted by 1 Will. and Mar. c. 9. "That every justice of peace in London and Westminster, and within ten miles thereof, shall cause to be arrested, and brought before him, all reputed Papists (except foreigners, being merchants, or menial servants to some ambassador or public agent, and persons of such small fortune, as may be exempted from the obligation of the statute of the said act, in London, &c. and such excepted persons as had

CH. 2. A DECLARATION AGAINST POETRY.

“had their dwelling in London, &c. within six months before the thirteenth of February 1688, and no dwelling elsewhere, and certified their names to the sessions before the first of August, 1689) and that every such justice shall tender the said declaration to every such person, and that every such person refusing the same, and afterwards remaining in London, &c. or within ten miles thereof, or being certified to the King's Bench or Quarter Sessions, at the next term or sessions, as having refused to make the said declaration, and neglecting to make the same in such court, shall suffer as a Popish recusant convict, &c.”

Sec. 4. As to the fourth of the above mentioned restraints, viz. That which relates to the keeping arms, it is enacted by 1 Will. and Mar. c. 15. “That any two justices of the peace may and ought to tender the said declaration to any person whom they shall know or suspect, or have information of, as being a Papist, or suspected to be such; and that no such person so required, and not making and subscribing the said declaration, or not appearing before the said justices upon notice to him given, or left at his usual abode, by one authorized by warrant under the hands and seals of the said justices, shall keep any arms or ammunition, or horse above the value of five pounds, in his own possession, or in the possession of any other person to his use (other than such necessary weapons, as shall be allowed him by the Quarter-Sessions for the defence of his house or person) and that any two justices of peace, by warrant under their hands and seals, may authorize any person in the day time, with the assistance of the constable or his deputy or the tithing-man, to search for all such arms, &c. and horses, and seize them to the king's use; and that the said justices shall deliver the said arms and ammunition at the next Quarter Sessions in open court; and that whoever shall conceal, &c. or shall be aiding to the concealing any such arms or horses, shall be committed to the common goal, by warrant under the hands and seals of any two justices of peace, and also forfeit treble the value; and that those who discover any such arms or ammunition, so as the same may be seized, shall have the full value thereof, to be awarded to them by the sessions, &c. and that such refusers of the said declaration, &c. shall be discharged whenever they shall make the same.”

See ch. 12. f.

Sec. 5. As to the above mentioned disability of presenting to the church; it is enacted by 1 Will. and Mar. c. 26. That whoever shall refuse to make the said declaration upon such a tender thereof as is prescribed by the said act, shall be disabled to present to any benefice, &c. and is thus rendered to be forth the cause of the said statute relating to this mat-

By 4 Geo. 3.
c. 2. s. 57. Pa-
pists are made
liable to pay
double land tax,
if they do not
conform in the
manner directed by the act.

ter at large in this place, inasmuch, as by 12 Anne, c. 14.
All persons whatsoever making profession of the Popish re-
ligion are under the like disability, as will appear from ch.
15. sect. 6, 7, &c.

CHAPTER THE FIFTEENTH.

OF OFFENCES IN PROMOTING OR EN- COURAGING THE POPISSH RELIGION.

1 Comm. 417.
4 Comm. 55.
115.

OFFENCES in promoting or encouraging the Popish
religion seem to be reducible to the following heads;
1. Giving or receiving Popish education. 2. Professing the
Popish religion. 3. Buying or selling Popish books.

For the effect
and consequence
of a foreign
education in a
popish seminary.
Vide Str. 318.
Comyns 207.

Andr. 104.
Lucas 113.
356. 406.
10 Mod. 113.

Sect. 1. The first offence of this kind, *viz.* That of giv-
ing or receiving Popish education depends upon several sta-
tutes; and first it is enacted by 1 Jac. 1. c. 4. s. 6. 7. "That
" if any person or persons under the king's obedience shall
" go or send, or cause to be sent, any child or any other
" person under their or any of their government, beyond the
" seas, out of the king's obedience, to the intent to enter
" into, or reside in, or repair to any college, &c. of any
" Popish order, profession or calling to be instructed, per-
" suaded or strengthened in the Popish religion, or in any
" sort to profess the same, every such person so sending such
" child, &c. shall forfeit 100 l. and every such person, so
" passing or being sent, &c. shall in respect of him or herself
" only, and not in respect of any of his heirs or posterity,
" be disabled to inherit, purchase, take, have or enjoy, any
" profits, hereditaments, chattels, debts, legacies or sums of
" money, &c. whatsoever: and that all estates, terms,
" and other interests whatsoever to be made, suffered or
" done, to the use or behoof of any such person, or upon
" any trust or confidence, mediately or immediately to or
" for the benefit or relief of any such person, shall be ut-
" terly void."

Feb. 263.
Vide 3 Que.
Abr. 789.
the cases
there cited.

Sect. 2. And it is farther enacted by 3 Jac. 1. c. 5. s. 16.
" That if the children of any subject within the realm (the
" said children not being soldiers, mariners, merchants, or
" their apprentices or factors) shall be sent or go beyond
" sea, to prevent their good education in England, or for
" any other cause, without the licence of the king or six of
" his privy council (whereof the principal secretary to be
" one) under their hands and seals, that then every such
" child

" child shall take no benefit by any gift, conveyance, descent, devise or otherwise of or to any hereditament or chattel, till such child being of the age of eighteen years or above, take the oath of obedience before some justice of peace of the county, liberty, or limit, where the parent of such child did and shall inhabit: and that, in the mean time the next of kin to such child, who shall be no Popish recusant, shall have the said hereditaments, &c. so given, &c. until such child shall conform, &c. and take the said oath and receive the sacrament; and that after such conformity, &c. he who hath received the profits of the said hereditaments, &c. shall account for the same, and in reasonable time make payment thereof, and restore the value of the said goods, &c. And that whoever shall send such child overseas, shall forfeit one hundred pounds."

Vide 11 & 12 Will. 3. c. 4. 18 Geo. 3. ch. 60.

Sec. 3. Also it is enacted by 3 Car. 1. c. 2. " That if any person under the obedience of the king shall go, or shall convey or send, or cause to be sent or conveyed, any person out of the king's dominions, into any parts beyond the seas, out of the king's obedience, to the intent to enter into, or be resident or trained up in, any priory, abbey, nunnery, Popish university, college or school, or house of Jesuits, priests, or in a private Popish family, and shall be there by any Popish person instructed, persuaded or strengthened in the Popish religion in any sort to profess the same, or shall convey or send, or cause to be conveyed or sent, any thing towards the maintenance of any person so going or sent, and trained and instructed, as is aforesaid, or under the colour of any charity towards the relief of any priory, &c. or religious house whatsoever; every person so sending, &c. any such person or thing, and every person passing or sent, being thereof convicted, &c. shall be disabled to prosecute any suit in law or equity, or to be executor or administrator to any person, be capable of any legacy or deed of gift, or to bear any office within the realm. And shall forfeit all his goods and chattels, and shall forfeit all his hereditaments, offices and estates of freehold, during his life."

The second offence of this kind, viz: that of professing the Popish religion, is punished with the following disabilities. *First*, Of taking an estate in lands. *Secondly*, Of presenting to a church.—Also it is punished with the following restraints, 1. From keeping school. 2. From withholding a competent maintenance from a Protestant child.

Sec. 4. As to the first of the abovementioned disabilities, viz: That of taking an estate in lands. It is enacted by 11 & 12 W. 3. c. 4. " That every person educated in or professing the Popish religion, who shall not, within six months after

1 Atk. 526.
537.
2 Atk. 65. 155.
210.
3 Atk. 155.
457.

2 Mod. 167.
2 P. Will. 5.
155. 364.
10 Mod. 89.
27.
Stranger 1206.
1 P. Will. 355.
Cowan. 462.
1 Will. 176.

"the age of eighteen years, take the oaths of allegiance and
"supremacy, and subscribe the declaration against popery
"mentioned in 30 Car. 2. stat. 2, chap. 1. in the Chancery,
"or King's Bench, or Quarter Sessions of the county where
"such person shall reside, shall in respect of himself or herself
"only, and not in respect of any of his or her heirs or pos-
"terity, be disabled to inherit or take by descent, devise or
"limitation, in possession, reversion or remainder, any lands,
"tenements or hereditaments, in England or Wales, &c.
"And during the life of such person, and until he take the
"said oaths, &c. his next of kin being a Protestant, shall
"enjoy the same, without being accountable for the profits,
"but shall not do wilful waste, under pain of forfeiting treble
"damages to the party so disabled: and all Papists, or per-
"sons making profession of the Popish religion, are disabled
"to purchase in their own names, or the names of others, to
"their use or in trust for them: and all estates, terms and
"other interest and profits whatsoever, out of lands made to
"their use, or on any trust, mediately or immediately, for
"their benefit, are void."

9 Mod. 172.
181.—But a
Papist tenant in
tail who suffers
a recovery to
himself in fee in
order to make a

Sec. 5. In the construction hereof it was resolved by the
House of Lords, in Roper's case, That the devise of the re-
sidue of money arising from the sale of an estate appointed to
be sold for payment of debts, &c. is within the statute.

marriage settlement; is not a purchaser within the act. Str. 267.

† But by 18 Geo. 3. c. 60. the above clause in the statute
of William the Third is repealed, and all persons having or
claiming any lands, tenements or hereditaments, under titles
not hitherto litigated shall enjoy the same as if the said act of
11 and 12 Will. 3. c. 4. had not been made, provided always,
"that all such persons, within the space of six calendar
"months after the passing of this act, or of the accruing of
"his, her, or their title, being of the age of twenty-one
"years; or within six months after he, or she shall attain the
"age of 21 years, or being of unsound mind, or in prison, or
"beyond the seas, then within six months after such disability
"removed, shall take and subscribe the oath in the words as
"recited in the statute." Which oath the courts of Record
and Chancery at Westminster, in Wales, Chester, Lancaster,
Durham, or any General or Quarter Sessions of the Peace,
of any county or place in England are required to administer
and to register.

4 Burn. 27.

Precedent of
oath made u-
der these sta-
tutes.
Lut. 1101.
1177.
G. mens 182
G. mens 181.
ad 1172.

Sec. 6. As to the second of the above mentioned disabili-
ties, viz. That of presenting to a church, which by 3 Jac.
1. 5. 8. 18. 20, 21. and 1 Will. & Mar. c. 26. did ex-
tend only to Popish recusants convicted, and persons refusing to
make the declaration against Popery, mentioned in 30 Car. 2.
it is enacted by 12 Ann. st. 2. c. 24. "That every
"Papist, or person making profession of the Popish religion,
" &c.

"&c. and every mortgagee, trustee, or person any ways intrusted by or for such Papist, &c. with or without writing, shall be disabled to present to any benefice, school, or hospital, &c. or to grant any avoidance of any benefice, prebend or ecclesiastical living; and that in all cases the Universities shall present."

Sec. 7. Also by force of the said statute, "The ordinary may tender the declaration against transubstantiation to any reputed Papist making a presentation, and upon a refusal to take the same, the presentation shall be void: also the ordinary may examine every presentee upon oath whether the person who presented him be the true patron, or only a trustee? And the court wherein a *quære impedit* shall be brought, may in like manner examine the parties, and a bill may be brought in any court of equity to discover such secret trusts, &c. and the answer of such persons upon any such examination or bill shall be good evidence against such patron, in respect of such a presentation, but not as to any other purpose."

† And it is also enacted by 11. Geo. 2. c. 17. s. 5. "That every grant of any advowson, or right of presentation, collation, nomination, or donation of and to any benefice, prebend, or ecclesiastical living, school, hospital or donative, and every grant or any avoidance thereof by any Papist, or person making profession of the Popish religion, or any mortgagee, trustee, or person any ways intrusted directly or indirectly, mediately or immediately, by or for any such Papist, whether declared by writing or not, shall be null and void, unless such grant shall be made *bona fide*, and for a full and valuable consideration to and for, and merely and only for the benefit of a Protestant purchaser, and every such grantee shall be deemed a trustee, &c. and compelled to discover, and according to 12. Anne.—And that every devise thereof, with intent to secure the benefit to the heirs or family of such Papist shall be null and void, and the devisee bound to discover as aforesaid."

Sec. 8. I do not know that any resolution hath been given on either of the above mentioned statutes of 7 Will. & Mar. or 12 Ann. However, the expositions which were made on 3 Jac. 1. seeming to be for the most part applicable to these latter statutes also, I shall take notice of the principal of them; as,

Sec. 9. First, That where a presentment is *pro hac vice* vested in the university by reason of the patron's being a Popish recusant at the time when the church became void, it shall not be divested again by his conforming himself to the church, or by his death.

Sec. 10. Secondly, That such a patron is only disabled to present, and that he continues patron as to all other purposes, and therefore that he shall confirm the leases of the incumbent, &c.

Wid. 3
108. 1. 1. Geo. 3.
1 G. 2. c. 1.
ch. 1. s. 2.
3 G. 2. c. 1.
28.

11. 17. 28.
C. 1. s. 1.
10. 57.

Caw ey 230.

1 Jon. 19, 20.

Sett. 11. Thirdly, That such a person by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years, *bona fide*, and for good consideration.

1 Jon. 20, 21, &c.

Hob. 126, 127.
Moor 872.

Sett. 12. Fourthly, That if an advowson or avoidance belonging to such a person come into the king's hands, by reason of an outlawry, or conviction of recusancy, &c. the king, and not the university, shall present.

Sett. 13. As to the first of the above mentioned restraints, *viz.* that which relates to the keeping school, it is enacted by the said statute of 11 & 12 Will. 3. c. 4. s. 3. "That if any Papist, or person making profession of the Popish religion, shall be convicted of keeping school, or taking upon themselves the education or government, or boarding of youth in any place within this realm, or the dominions thereunto belonging, they shall be adjudged to perpetual imprisonment."

Wiche. 131
C. 202.

† But this clause is repealed by 18 Geo. 3. c. 60. provided the party shall take and subscribe the oath therein recited, before he shall have been apprehended or any prosecution commenced against him.

Sett. 14. As to the second of the above mentioned restraints, *viz.* that which relates to the power of a Popish parent over his Protestant child, it is enacted by the said statute of 11 & 12 Will. 3. c. 4. "That if any Popish parent, in order to compel a Protestant child to a change of religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child, the Lord Chancellor upon complaint may make such order therein, as shall be agreeable to the intent of the said act."

4 Comm. 115.

See 1 & 4 Ed.

6. c. 10.

13 Elis. c. 2.

Sett. 15. The third offence of this kind, *viz.* that of selling or buying Popish books, depends upon 3 Jac. 1. c. 5. s. 25. by which it is enacted, "That no person shall bring from beyond the seas, nor shall print, buy, or sell any Popish primer, ladies psalters, manuals, rosaries, Popish catechisms, missals, breviaries, postals, legends and lives of saints, containing superstitious matter, printed or written in any language whatsoever, nor any other superstitious books printed or written in the English tongue; on pain of forfeiting forty shillings for every book, &c. and the books to be burnt."

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE ESTABLISHED CHURCH BY PROTESTANT DISSENTERS.

OBSTINATE nonconformists were compellable by 31 Eliz. c. 1. to abjure the realm, and were also subject to all the penalties mentioned in the tenth and eleventh chapters of this book; and dissenters were farther restrained by 17 Charles the Second, chapter 2. and 22 Charles 2. ch. 1.—But at this day by 1 William & Mary c. 18. s. 2. “All persons dissenting from the church,” except papists, and those who shall in preaching or writing deny the doctrine of the Trinity, “are exempted from all penal laws relating to religion,” except the twenty-fifth of Charles the Second, chap. 2. by which all officers of trust are bound to receive the sacrament according to the usage of the church of England, and also to take the oaths of allegiance and supremacy, and the test, and also except 30 Charles 2. st. 2. c. 1. by which the members of both houses of parliament, and all the king’s sworn servants (a) are bound to make a declaration against transubstantiation, and the invocation of saints, and the sacrifice of the mass, “provided such dissenters take the oath of allegiance, and supremacy, and make the said declaration against transubstantiation, &c. and come to some congregation for religious worship, in some place registered (1) either in the bishop’s court or at Sessions, the doors whereof shall be neither locked, barred, nor bolted.”

12 Burn. F. L.
243.
4 Comm. 53.
2 Jones 225,
233, 234.

vide sup. ch. 8.

(a) This clause relating to the king’s sworn servants is repealed by 2 Geo. 2. c. 31. Salk. 527.

(1) In registering the certificate, the justices are merely ministerial, and if persons resorting to any such meeting house, do not bring themselves within this act, such registering will not protect them from the penalties of the law. 1 Black. 606.—Nor doth this act extend to all persons who shall think fit to stile themselves protestant dissenters. 3 Burn. E. L. 179. therefore if a man be a professed churchman, and only sometimes go to meetings, the toleration act will not excuse him. 6 Mod. 190. A minister also, exercising his functions, without being licensed, by the bishop, Lindwood 288. in a chapel of ease, according to the rites of the church of England, is not within the act, for by Lord Hardwicke, it was made to protect tender consciences from penalties, and to extend it to those of the church who act contrary to its rules and discipline, would introduce an endless confusion. 2 Atk. 498.

Sec. 2. Also by section 8, 9, 10, 11, 12. “Dissenting teachers are tolerated, if they take the said oaths, &c. at the General or Quarter-Sessions to be held for the place where such persons live, and subscribe the thirty-nine articles of the church of England, except those few scrupled ones concerning church-government and infant-baptism.” And by

Salk. 572.
Burr. 1043.

by 10 Anne c. 2. s. 7, 8, 9. "They may qualify themselves, as well during a prosecution upon any penal statute, as before, and being qualified in one county may officiate in another, upon producing a certificate, and taking the said oaths, &c. if required."

As to Quakers
Vide 8 Geo. 1.
c. 6. and 22
Geo. 2. c. 46.
s. 36.

Sec. 3. Also by, the said statute of 1 William and Mary s. 13, 14, 15. Those who scruple the taking of any oath, are within the like indulgence, provided they subscribe the, aforesaid declaration, and also a declaration of fidelity to the king, and against the deposing doctrine and papal supremacy; and also profess their faith in God the Father, and Jesus Christ his eternal Son, the true God, and the Holy Spirit, one God for evermore; and acknowledge the holy scriptures of the old and new testament to be given by divine inspiration.

3 Lev. 376.
Gibb. 519.
Sec. vide the
marriage act.
26 Geo. 2. s.
c. 33. *Infra.*

Sec. 4. Since this statute a prohibition lies to the spiritual court proceeding against persons for incontinency, who have been married in a licensed conventicle.

† *Sec. 5.* And by 19 Geo. 3. c. 44. which declares the 1 Will. & Mar. c. 18. to be a public act, "every person dissenting from the church of England in holy orders, or pretended holy orders, or pretending to holy orders; being a preacher or teacher of any congregation of dissenting protestants, who, if he scruple to declare and subscribe as aforesaid, shall take the oaths, and make and subscribe the declaration against popery required by the said act of 1 Will. & Mary, to be taken, made and subscribed by protestant dissenting ministers, and shall also make and subscribe a declaration in the words following 'I A. B. do solemnly declare, in the presence of Almighty God, that I am a christian, and a protestant, and as such that I believe that the scriptures of the old and new testament, as commonly received among protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice' shall be, and every such person is hereby declared to be, intitled to all the exemptions, benefits, privileges and advantages of 1 Will. & Mary c. 18. and 10 Anne c. 2. and the justices of the peace at the General Sessions of the peace, where any protestant dissenting minister shall live, are required to administer the last mentioned declaration to such minister, upon his offering himself to make and subscribe the same."—And it is further enacted, "that no protestant dissenter so qualified as aforesaid, shall be prosecuted for teaching and instructing youth, as a tutor or schoolmaster, in any case whatsoever,"—provided always "that this qualification shall not intitle such dissenters to obtain or hold, the mastership of any college or school of royal foundation, or of any other endowed college or school for the education of youth, unless founded since 1 Will. & Mary for

"for the immediate use and benefit of protestant dissenters." (2).

(2) The law so far favours dissenters, as to permit the establishment of charities for the support of their min. 2 Vesey 273. Burr. 1267. and they are exempted by this act 1. 11. from serving upon juries, and upon county, ward, or parish officers. And by 19 Geo. 3. c. 44. from serving in the militia under 2 Geo. 3. c. 20. The King's bench also will grant protection to a protestant dissenting minister by mandamus. Burr. 1265. By information also for the disturbance of his congregation. Gibb 304. 1 Mod. 168—And to destroy any seditious meeting-house registered according to the toleration act is felony without clergy. And the hundred made liable to the damages. 1 Geo. 1. st. 2. c. 5. L. Ray. 125.—But a marriage can be celebrated, but in some church or chapel where banns have usually been published; unless the parties are Jews or Quakers. 25 Geo. 2. c. 33.—And by Lord Mansfield all the consequences of the act of toleration ought to be pursued with the greatest liberality in case of the scrupulous consciences of dissenters; guarding at the same time against any prejudice that may arise to the rest of the king's subjects from this indulgence and protection. Cowp. 388; 393. 4 Comm. 52.—Respecting meeting-houses in Scotland, vide 10 Anne c. 7. 19 Geo. 2. c. 38. 21 Geo. 2. c. 34.

CHAPTER THE SEVENTEENTH.

OF HIGH TREASON.

Offences more immediately against man, some are more immediately against the king, others more immediately against the subject.—Offences more immediately against the king are either capital or not capital. The capital offences of this nature are either high treason or felonies.

Sec. 1. And First, Of high treason; concerning which, before 25 Edw. 3. c. 2. there was great diversity of opinions, and many offences were taken to be included in it, besides those expressed in the said statute; as the killing of the king's father, brother or, even of his messenger; producing the pope's bull of excommunication, and pleading it in disability; refusing to accuse a man in the king's courts, and summoning him to appear, and defend himself before a foreign prince; and other such like acts tending to diminish the royal dignity of the crown.

Sec. 2. But all treasons were settled by the said statute of 25 Edw. 3. c. 2. which, by 1 Mary, sess. 1. c. 1. was reinforced, and again made the only standard of treason; and all statutes between the said statutes of 25 Edw. 3. and 1 Mary, which made any offences high or petit treason, or misprision of treason, are abrogated. So that no offence is, at this day, to be esteemed high treason, unless it be either declared to be such by the said statute of 25 Edw. 3. or made such by some statute since the first of Mary.

And therefore I shall consider, First, Such offences as are high treason within the said statute of 25 Edw. 3. or other

statutes grounded thereon, and explaining the same.—*Secondly*, Such as are made high treason by subsequent statutes.

1 Ha.
Sum.

And First, By the said statute of 25 Edw. 3. there are four kinds of high treason. *First*, That which immediately concerns the king, his wife, or children. *Secondly*, That which concerns his office in the administration of justice. *Thirdly*, That which concerns his seal. *Fourthly*, That which concerns his coin—And these three last are called interpretative treasons.

1 H. 4. c. 10.
Kely. 20.
3 Inst. 1. 6. 113.
8 Co. 28.
Dyer 98. 293.
128. 332.
B. Trea. 1, 2,
3. 7. 9. 11. 13.
16. 19. 24. 27.
32.
Co. Pla. 368.
3 Co. 2. 12.
4 Co. 57.
7 Co. 33.
13 Co. 54.
Sav. 4.

Secd. 3. That of the first kind is thus declared by the following words of the said statute of 25 Edw. 3. “Whereas divers opinions have been before this time, in what case treason shall be said, and in what not, the king, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth; that is to say,—When a man doth compass or imagine the death of our lord the king.—Or of my lady his queen,—Or of their eldest son and heir;—Or if a man do violate the king’s companion,—Or the king’s eldest daughter unmarried;—Or the wife of the king’s eldest son and heir;—Or if a man do levy war against our lord the king in his realm;—Or be adherent to the king’s enemies in his realm, giving them aid and comfort in the realm or elsewhere,—and thereof be provably attainted of open deed by the people of their condition.”

For the explication of which I shall consider, First, The branch relating to the king and his relations. Secondly, That concerning the levying of war, and adhering to the king’s enemies, &c. Thirdly, That concerning an overt act.

As to the branch relating to the king and his relations, I shall consider the following particulars: 1. Who may be guilty? 2. What is the import of the words, “*Compass or imagine the king’s death?*” 3. Who is a king within the act? 4. What is the extent of the clause concerning the king’s relations?

Kellw. 181. &c.
3 Inst. 4. 8.
Calvin’s case 6.
4 Comm. 29.
Sum. 47.
Bac. 256.
5 Bac. 112.

Secd. 4. As to the first point, viz. Who may be guilty? I shall take it for granted at this day, That all subjects of the age of discretion, and of sane memory, whether they be ecclesiastical or temporal, men or women, are included within those general words “When a man doth compass, &c.”

(a) B. Trea. 12.
3 Inst. 5. 11.
Co. Lit. 125.
Sum. 10. 15.
1 Hale 96.—
100.
5 St. Tr. 25.
6 St. Tr. 87.

Secd. 5. Also it seems clear, that the subjects of a foreign prince coming into England, and living under the protection of our king, may, in respect of that local ligeance which they owe to him, be guilty of high treason (a), and indicted that they, *contra dominum regem*, (the words *naturalium dominum suum* being omitted) did compass, &c. *contra ligeantiam suam*

ſua debitum (b). And it is ſaid, that even an ambaffador (b) Dyer 145. committing a treason *againſt the king's life*, may be condemned and executed here, and that for other treaſons he ſhall be ſent home.—And it hath been holden, that there is no neceſſity for the words *contra ligeantia ſua debitum* in an indictment for a treason, which is made ſuch by ſtatute, and is not a treason in its own nature. And that there is no neceſſity for the words *contra ligeum ſupremum dominum ſuum* in any indictment of treason.

Hob 271.
Salk. 631. 633.
Carth. 349.
Skin. 460. 425.
Fol. 186. 187.
L. Ray, 1.
3 Lev. 396.
4 Mod. 162. 395.
7 Co. 6.
12 Mod. 51.
95. 1 Hale. 59.

Sec. 6. But it ſeemeth that aliens, who in an hoſtile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themſelves or company with Engliſh traitors, cannot be puniſhed as traitors, but ſhall be dealt with by martial law.

B. Tre. 1, 32.
3 Inſt. 11.
Con. Dalif. 32.
7 Co. Rep. 6.
5 Bac. Ab. 112.
5 St. Tr. 23.

Sec. 7. It hath been reſolved, That one born a natural ſubject is bound to ſuch an inſeparable allegiance to our king, that howſoever he may endeavour to renounce it, and transfer his ſubjection from his natural to a foreign prince, yet if he practice what in any other ſubject would amount to high treason, he ſhall ſuffer as a traitor.

Dy. 300. 298.
Co. Lit. 125.
Fol. 70. 184.
1 Hale 68. 96.

Sec. 8. As to the ſecond point, viz. the import of the words “Compaſs or imagine the king's death.” Since the ſaid ſtatute theſe words have been ſo ſtrictly followed, that where a king has been actually murdered, yet not the killing him, but the compaſſing his death has in the indictment been laid as the treason, and the killing as an overt act thereof.

Kely. 8.
1 Hale 107.
119—127.
Prin. P. L. 123.
Fol. 193. 196.
3 Inſt. 12.

Sec. 9. And ſuch compaſſing the king's death may be maniſteſted not only by overt acts of a direct conſpiracy to take away his life, but alſo by ſuch as ſhew ſuch a deſign, as cannot be executed without the apparent peril thereof; as by (c) writing letters to a foreign prince, inciting him to invade the realm; or aſſembling men together in order to (d) imprifon or (e) depoſe the king, or to (f) compel him by force to yield to certain demands, or to levy war againſt his (g) perſon.

(c) Dyer 298.
Burr. 646.
Sum. 11.
1 St. Tr. 199.
206.
2 Vern. 315.
3 Inſt. 14.
4 St. Tr. 406.
1 H 12 120.
(d) 3 Inſt. 6.
12. 38.
(e) Kely 20.

11. 22. Qu. B. Tre. 24. (f) 11 Mod. 322. Moor. 621. (g) Kely 14, 15. 17. 20. 21. 2 Inſt. 6. 12. 38. 1 Lev. 20, 21, 22. Yet this was made a query in B. Tre. 24. 11 Mod. 322. Moor 621. Kely 14, 15, 20, 21.

(1). Every thing actually and deliberately deſigned, or attempted to be done, whereby the life or majeſty may be endangered, is an act of compaſſing his death. Fol. 195; where the guilt commences only when the *meaſure* ſhall appear to have been *taken*, to effectuate the guilty purpoſe. Prin. P. L. 121. 1 Hale 119. Kely. 17.

Sec. 10. But it is poſſible that it may not be proved by an act, which directly cauſes the king's death; as the glancing of an arrow did that of William Ruſus, proving fatal merely through an unfortunate accident, and being accompanied with no unlawful circumſtance.

3 Inſt. 6.
1 Hale 107.

Sum. 17.
3 Inst. 7.
1 Hale 101. &c.
Fol. 183. 400.
4 Comm. 77.

SECT. 11. As to the third point, *viz.* Who is a king within this act? It seems agreed, that every king for the time being, in actual possession of the crown is a king, within the meaning of this statute. For there is a necessity that the realm should have a king, by whom and in whose name the laws shall be administered; and the king in possession being the best person, who either doth or can administer those laws, must be the only person who has a right to that obedience, which is due to him who administers those laws; and since by virtue thereof he secures to us the safety of our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

1 Hale 61, 102,
103.
Sum. 12.
Stow, Ann.
418.
Fol. 308. 106.
2 Fd. 4. 1.
B. 100. 112.
3 Inst. 7.
Dalt. 22.

SECT. 12. And this plainly appears even by the prevailing opinions in the time of king Edward the Fourth, in whose reign the distinction between a king *de jure* and *de facto* seems first to have begun; and yet it was then laid down as a principle, and taken for granted in the arguments of Bagot's case, that a treason against Henry the Sixth, while he was king in compassing his death, was punishable afterward Edward the Fourth came to the crown, from which it follows that allegiance was allowed to have been due to Henry the Sixth while he was king, because every indictment of treason must lay the offence, *contra ligantie debitum*.

9 Ed. 4. 1. 2.
B. Judg. 12.
C. of F. 22.
Par. 27.
Dent. 15.
1 Comm. 4.
10 Ed. 4. F.
Att. 29. Deniz. 1.

SECT. 13. It was also settled, That all judicial acts, done by Henry the Sixth while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by Edward the Fourth, before he was actually king, was void, even after he came to the crown.

9 Ed. 4. 1. 2. 11. 9 Ed. 4. 2.

SECT. 14. And by the 11 Hen. 7. c. 1. it is declared "That all subjects are bound by their allegiance to serve their prince and sovereign lord for the time being, in his wars, for the defence of him and his land against every rebellion, power, and might reared against him, &c. and that it is against all laws, reason, and good conscience, that they should lose or forfeit any thing for so doing;" and it is enacted, "That from thenceforth no person that attend on the king for the time being, and do him true and faithful allegiance in his wars, within the realm or without, shall for the said deed and true duty of allegiance be convicted of any offence."

Foster 22.
Cof. de Nor-
mond. 13.
Fleta. b. 3. c.
16. s. 22.

SECT. 15. From hence it clearly follows: First, That every king for the time being has a right to the people's allegiance, because they are bound thereby to defend him in his wars against every power whatsoever.

4 Comm. 79.
Fol. 100.

SECT. 16. Secondly, That one out of possession is so far from having any right to our allegiance by virtue of any other title, which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him.

SECT.

Sec. 17. It is true indeed, that after the restoration of King Charles the Second, it was resolved, that all those who acted against, and kept him out of possession, in obedience to the powers then in being, were traitors.

Foster 402.
Kely. 14.

Sec. 18. But it ought to be considered, that it was first resolved by the same judges, that king Charles the Second was king *de facto* as well as *de jure*, from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws.

Kely 14, 15.
1 Keb. 315.
Foster 403.
1 Keb. 454.
4 Comm. 77.

Sec. 19. However, it is a general uncontested rule, that upon the death of a king in actual possession of the crown, his heir is a king within the act before his coronation. For without a king to execute the laws, justice must fail; and therefore is a maxim, that the king never dies.

3 Inst. 7.
Sum. 12.
1 Hale 67. 102.
Fol. 188. 189.

Sec. 20. A titular king, as the husband of a queen regnant, seems to be within the words, yet it is clearly not within the meaning of this law; and *à converso*, a queen regnant is not within the strict words, and yet she is undoubtedly within the meaning; for by the words, "Our lord the king," is meant any person invested with the regal power.

1 Hale 102.
106.
1 Mar. ft. 3.
c. 1.
Sum. 12.
3 Inst. 8.
4 Comm. 76.
77.

Sec. 21. By 1 Will. and Mar. sess. 2. c. 2. s. 9. "Every person that shall be reconciled to, or hold communion with, the church of Rome, or profess the Popish religion, or marry a Papist, shall be excluded, and be for ever incapable to inherit, possess, or enjoy the crown of this realm, &c. And in every such case the people of this realm are absolved from their allegiance, &c."

Sec. 22. As to the fourth point, *viz.* The extent of the clause concerning the king's relations. It to be observed,—First, That no queen or princess dowager is any way within the purview of it. Secondly, That if the companion (by which word is meant the wife) of the king or prince, consent to an adulterer, she is no less guilty of high treason than he. Thirdly, That under the words "Their eldest son and heir," the son of a queen regnant is included, and also the second son after the death of the first, and *perhaps* also a collateral heir apparent, especially if he be declared such by parliament. (2).

Hale 124, &c.
B. u. c. 22.
3 Inst. 2. 3.
Sum. 12.
4 Comm. 81.

(2) A queen, divorced a *vinculo matrimonii*, is not within this statute, 1 Hale 124; nor is the wife of a king's second son, although her issue would succeed to the throne in preference to the issue of the eldest daughter; neither doth it seem treason to violate the eldest daughter, that hath been married, such violation not being within the letter, though within the reason of the statute Prin. P. L. 124, 125.—The king's eldest daughter, if he has no son, is neither within the word nor the meaning of "the king's eldest son," for a son may possibly be born. It is therefore usual for the legislature to provide for this case, 1 Hale 127. And both Coke and Hale are of opinion that a collateral heir apparent is not within the statute until he is so declared by parliament, 3 Inst. 9. But a second daughter, the eldest being dead, is within the words, "the king's eldest daughter unmarried," 1 Hale 128. Foster's first Discourse.

1 Hale 131.
121. 150. 153.
Foster 208.

And now we are come to the Second general branch of this kind of high treason, viz. That concerning the levying of war, &c. and adhering to the king's enemies, &c. In treating whereof I shall consider, First, What acts shall be said to amount to a levying of war against the king. Secondly. What shall be said to be an adherence to the king's enemies.

Foster 195.

Sect. 23. As to the first point, it is to be observed, that not only those who directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases, those who in a violent and forcible manner withstand his lawful authority, or endeavour to reform his government, are said to levy war against him; and therefore,

Fol. 13, 14.
216. 217. 219.
3 Inst. 16.
B. Treas. 24.
Dalt. c. 89.
1 Hale 49. 139.
146. 296 168.
169.
Moor 621.
Sum. 14. 2 And. 5. Kely. 75. 9 St. Tr. 57. 566. F. Salk. 635.

Sect. 24. Those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him.—But those who join themselves to rebels, &c. for fear of death, and retire as soon as they dare, seem to be no way guilty of this offence (3).

(3) The apprehension of injury to property either real or personal, of whatever extent; or how ever enormous or impending it may be, will not extenuate the guilt of this offence; for every artful leader of a rebellion might easily contrive to furnish his followers with this excuse. 8 St. Tr. 56. & Comm. 30. 83. The just apprehension of immediate death, derived from a tedious force upon the person of the offender, and continued in such a manner throughout the period of subjection, that the traitor could not attempt an escape with probability of success, is the true and only circumstance that will extinguish the guilt, and avoid the punishment of *confrained treason*. 9 St. Tr. 566.—And this plea has been very strictly construed; for the officer who commanded at the execution of Charles the First, alledged in vain upon his defence, that he had acted by the command of superior, whose power compelled him to obey. 1 Hale 50. Kely 13. And certainly it is not for private individuals, misguided by ignorance or heated by faction, to determine the proper moment of resistance, Prin. P.L. 131.—But whether force or no force; how long that force continued, with every circumstance tending to shew the practicability of an escape are facts for the consideration of a jury. Fol. 14. 216.

1 Hale 131.
135. 152. 153.
Moor 621.
C. Car. 583.
589.
Pop. 122.
2 And. 4, 5.
3 Inst. 9.
1 Ven. 250.
Sum. 14.
Kely. 76.
2 Will. 305.
8 St. Tr. 289.
Foster 209.
210. 211.
Doug. 510.

Sect. 25. Those also who make an insurrection in order to redress a publick grievance, whether it be a real or pretended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority, which he by publick justice ought to do, which manifestly tends to a downright rebellion; as where great numbers by force attempt to remove certain persons from the king; or to lay violent hands on a privy counsellor; or to revenge themselves against a magistrate for executing his office; or to bring down the price of victuals; or to reform the law or religion; or to pull down all bawdy-houses; or to remove all inclosures in general, &c. (4)—But where a number of men

(4) An attempt by intimidation and violence to force the repeal of a law, is a levying of war against the king and high treason. Lord Mansfield, Doug. 57c.

rise to remove a grievance to their private interest, as to pull down a particular inclosure intrrenching upon their common, &c. they are only rioters.

Sec. 26. In a special verdict, not only those who are expressly found to have been aiding and assisting a rebellious insurrection, but perhaps also those who are only found to have acted in the execution of the intended violence, or to have attended the principal offender from the beginning, though they be not found to have known the design of the rising, shall be adjudged guilty of high treason. But those who are found only to have suddenly joined with them in the streets, and to have flung up their hats and hallowed with them, are guilty of no greater offence than a riot at most.

Sec. 27. However it is certain, that a bare conspiracy to levy such a war cannot amount to treason, unless it be actually levied. Yet it hath been resolved, that a conspiracy (5) to levy war against the king's person may be alledged as an overt act of compelling his death, and that in all cases, if the treason be actually completed, the conspirators, &c. are traitors as much as the actors; and (a) that there may be a levying of war, where there is no actual fighting.

3 Inst. 11. 1 Hale 165. to 169. Sum. 14. 115. Dalif. 89, 224. 2 Ven. 31. 315, 316. 5 Bac. Ab. 117. Fuller 34. Prin. P. L. 122. 10 Mod. 322.

(5) By 13 Eliz. and 13 Car. 2. conspiracies to levy war were declared high treason; and several judgments were given upon these statutes; but they both expired with the reigns they were designed to protect. Foist. 213.

Sec. 28. As to the second point, viz. what shall be said to be an adherence to the king's enemies, &c. this is explained by the words subsequent, "Giving aid and comfort to them;" from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, &c. or assisting (b) the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the king's subjects is clearly within this branch. But there is no necessity, expressly to alledge, that such adherence (c) was against the king, for it is apparent; (6) yet the special manner of adherence must be set forth. And it is said, that the succouring a rebel fled into another realm is not within the statute, because a "rebel is not properly an enemy," and the statute is taken strictly.

(6) Although the solemnity of a previous denunciation of war is not always necessary or expedient. Bynkershoek, p. 1. Yet it is necessary to aver, in proceedings on this clause of the act, that the persons adhered to, were the king's enemies, 2 Ventris 316. which fact may be evidenced by its public notoriety. Prin. P. L. 136. Vide 2 & 3 Ann. 2. 20. f. 34.

Fof. 194. 20.
1 Hale 122.
5 St. Tr. 21.
22.

Sec. 29. As to the branch relating to an overt act, I shall take it for granted, that some overt act must be alledged in every indictment of high treason, in compassing the death of the king, &c. or levying war, or adhering to the king's enemies; but there hath been some question concerning what shall be said to be such an overt act, as to which I shall consider, — First, What facts amount to such an overt act: Secondly, Whether any words be sufficient.

10 Mod. 322.
3 Inst. 14.
Keyl. 29.

Sec. 30. As to the first point it seems clearly agreed by all, that conspiring the king's death, and providing weapons to effect it, or sending letters to incite others to procure it, or actually assembling people in order to take the king into their power, and all other such like notorious facts, done in pursuance of a treasonable purpose against the king's person, may be alledged as overt acts to prove the compassing his death.

(a) Kely. 14.
17.
(b) Kely. 20.
3 St. Tr. 149.
158. 178. 228.
4 St. Tr. 61.
79. 207. 277.
2-8, 282.
Rushw. Straf-
ford's Trial
634.
(c) Kely. 15.
3 St. Tr. 126.
(d) 1 And. 106.
(e) 2 Vind. 316.
(f) 1 Kely 22.
1 St. Tr. 917.
3 St. Tr. 228.
Prin. P. L. 17

Sec. 31. It has also been adjudged, that the (a) levying war against the king's person; or the bare (b) consulting to levy such war; or meeting together and (c) consulting the means to destroy the king and his government; or (d) assembling with others, and procuring them to attempt the king's death; or lifting (e) men in order to depose the king; or (f) printing treasonable positions, as that the king is accountable to the people, and that they ought to take the government into their own hands, &c. or publishing a book to prove that (g) the king's government is antichristian and heretical, &c. may be alledged as overt acts to prove the compassing the king's death (7).

Sup. f. 24. (g) 2 Roll. 89, 90 Fof. 346. 11 Mod. 322. Bae. Ab.

(7) Solicitor a prince, in amity with the crown, to invade the realm is an overt act of the intention to levy war and may be said as an overt act of compassing the king's death. — And a correspondence designed to enable the enemy to annoy us or defend themselves, although intercepted in its first progress, at the post office, is an overt act of both these species of treason. Burrow 646. 10 State Trials Appen. 77. for the treason was complete on the part of the agent though it had not the effect he intended. Fof. 217, 218. Prin. P. L. 137.

2 Roll 89.
C. Car. 15.
See the reversal
of the attainder
of A. Sidney,
1 W. & M. St.
c. 7. private
acts.
1 Hale 118.
3 St. Tr. 233.

Sec. 32. As to the second point, viz. Whether any words are sufficient overt acts? It has been holden, That written words in a sermon or other writing may amount to overt acts of compassing the king's death, though the same neither actually were, nor ever were intended to be, preached or published. But this opinion seems to be over severe; for though it be true, that *scribere est agere*, yet surely it cannot with any propriety be said, that to write in such a private manner *est aperte agere*, and it seems rigorous to make that amount to a malicious design against the king, which perhaps

perhaps was only done by way of amusement or diversion (8).

(8) This is Peachum's case. The reporter says that "many of the judges were of opinion that it was not treason;" It therefore weighs very little; and no great regard hath been paid to it ever since, Fof. 199. and, if the *dark manner* be considered, in which the conviction of this innocent clergyman was procured, still less regard will be paid to it. Vide Bacon's Letters 111, 117. and Hume's Hist.

Secl. 33. But the great question is, Whether words only spoken can amount to an overt act of compassing the king's death? Which having been questioned by some great men, and denied by others, I dare not be peremptory concerning it (9).

S. P. C. 2.
Kely. 13.
3 Inst. 5. 14.
140.
Suam. 13.

(9) The intentions of the mind cannot be discovered but through the medium of some plain and unequivocal act; Stamford therefore inclines to think that a compassing "*utere per parok;*" is not such a sufficient overt act, from which an inference of the guilty purpose should be drawn. S. P. C. 2. Foster. 202. Lord Coke says, that *without an overt act* words may make a man a heretic, but cannot make him a traitor, because they are capable of such an endless variety of construction, that few agree in the same opinion concerning them. 3 Inst. 14. 140. Foster 200. And Lord Hale expressly says, that bare words are not an overt act of treason. 1 Hale 111. 323.

Secl. 34. However it seems agreed, that words spoken only in contempt and disgrace of the king, and not directly shewing any purpose to rebel, or any way to hurt his person, or disturb his government, as those which charge him with a personal vice, as drunkenness, &c. or a personal defect, as want of wisdom or steadiness, &c. shall not be so far strained as to be made overt acts of compassing his death, &c.

C. Car. 117.
126.
Foster 20

Secl. 35. Indeed it has been holden, that to affirm that another has a better title than the king is high treason, because it tends to draw people from their allegiance, and to create a mutiny, &c. but perhaps this may be questioned, because it cannot certainly appear from such words, whether the speaker had a design against the king's person or no? However there can be no doubt, but that such discourses are highly punishable, as great misdemeanors, and tending to raise doubts, and disturb the government.

Secl. 36. All the following words have been adjudged high treason, "If king Henry the Eighth will not take back his wife, he shall not be king, but shall die."—"If the king will arrest me for high treason I will stab him."—"If I knew that Perkin Warbeck was the son of Edward the Fourth, I would take his part against Henry the Seventh."

1.
2.
P. L.
12 126.

Secl. 37. But however the laws may stand in relation to such conditional words, or to loose words spoken without relation to any act, yet it seems clear, that words joined to an act may explain it, and that words of persuasion to kill the king, or manifesting an agreement, or consultation, or directions to

Salk. 611.
2 Ven. 315.
4 St. Tr. 30.
31. 95, 172.
1 Hale 119,
116.
1 Roll. 185.

12 Mod. 72. C. Car. 117. 118. 125. 332, 333. 1 Lev. 57. 2 St. Tr. 133. 135. 3 St. Tr. 255. 1007. 1 Keb. 14. 14. 179. 231. Dalt. 223, 224. 3 Mod. 53. See the precedent cited C. Car. 118. Foster 202.

that

that purpose, are sufficient overt acts of compassing his death. And it hath been strongly holden, that any deliberate words, which shew a direct purpose against the king's life, as the c. "If I meet the king I will kill him," being spoken maturely and advisedly, are sufficient overt acts of compassing or imagining his death. (10)

(10) It is said, Kelynge 13, that in an indictment for "compassing the king's death" words may be laid as an overt act of that species of treason, yet Croghan's Case, Cro. Car. 333, which he cites as a precedent for this doctrine, is said, by Mr. Justice Foster, 203, by no means to warrant the conclusion, because though the words above mentioned were laid in that indictment, yet it further charged, that the speaker actually came into England for the purpose of killing the king. 1 Hale 116.---And it has been laid down on more occasions than one, since the Revolution, that loose words, not relative to any act or design are not overt acts of treason. 4 St. Tr. 581. 645. 1 Black. Rep. 37.

Yelv. 107. 197.

C. Jac. 276.

406. 413.

Hut. 75.

Winch. 124.

1 Bull. 149.

3 Bull. 225.

1 Roll. 444.

Foster 202, 203,

204.

Self. 38. And since the compassing or imagining of the king's death is the treason, and words be the most natural means of expressing the imagination of the heart, why should they not be good evidence of it? Besides, it has been often adjudged, That falsely to charge a man with speaking treason is actionable, which could not be, if no words could amount to treason, as in the arguments of those cases it is clearly holden that they may, and not so much as made a question.

Self. 39. Besides it is certain, that before the 25 Edw. 3. words might amount to treason; and it is a general rule, that in doubtful cases the reason of the common law ought to govern the construction of a statute. Also there can be no doubt but that he, who by command or persuasion induces another to commit treason, is himself a traitor; (for without question by such means he would be accessory to a felony; and it is an uncontroverted rule, that whatever will make a man an accessory in felony, will make him a principal in treason) and yet he does no act but by words.

Self. 40. As to Sir Edward Coke's argument from 3 Hen. 7. c. 14. which makes the compassing the king's death, or that of any of his council, &c. by the king's servants, felony; from whence he infers, that in the judgment of this parliament, the compassing the king's death by bare words could not be treason before; it may be answered, that this argument extends as well to the king's servants compassing his death by any other act whatever, as to their doing it by bare words; for all are equally within the 3 Hen. 7. and yet none will contend, but that the former hath always been treason.

Self. 41. As to the argument, that compassing the king's death by bare words cannot amount to treason, within 25 Edw. 3. because many late temporary acts of parliament have made it treason, which would be needless if it were so before; it may be answered, that the principal end of those statutes was to make it treason to charge the king with heresy

Sum. 13.

1 Hale 115.

115. 323.

3 Inst. 14.

Foster 205.

S. P. C. 2.

Sum. 215.

Fol. 205, 207.

5 Inst. 38.

1 Hale 111.

Foster 201.

in notis.

or feignism, or usurpation, or to affirm that it was lawful to take up arms against him, which the Romanists were apt to be guilty of at the beginning of the reformation, and it may be questioned whether these be overt acts of high treason within 25 Edw. 3.

Video Roll. 89.
90.

Sect. 42. Indeed it is recited in the preamble of 1 Mary, sess. 1. c. 1. "That the state of every king consists more assuredly in the love of the subjects towards their prince, than in the dread of laws made with rigorous pains; and that laws made for the preservation of the commonwealth without great penalties are more often obeyed and kept, than laws made with extreme punishments. And in special such laws so made, whereby not the ignorant but also the learned, minding honesty, are often trapped, yea many times for words only, without other fact or deed done or perpetrated; and thereupon the queen calls to remembrance, that many, as well honourable persons, as others of good reputation, had then of late, (for words only, without other opinion, fact, or deed) suffered shameful death, and expresses her pleasure, that the severity of such like extreme dangerous and painful laws shall be abolished." And then follows the enacting clause, "That from thenceforth none act or offence, " being by act of parliament or statute made treason, petit treason, or misprison of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprison of treason but only such as be declared and expressed to be treason, petit treason, or misprison of treason, by 25 Edw. 3. Nor that any pains of death, penalty, or forfeiture, in any ways ensue to any offender for the doing any treason, &c. other than such as by the said statute of 25 Edw. 3. be ordained; any statute since the said twenty-fifth year of Edw. 3. or other declaration to the contrary in any wise notwithstanding."

Sect. 43. And it must be confessed, that this statute, *prima facie*, seems very much to favour the opinion, that no words whatsoever can of themselves amount to overt acts of high treason, inasmuch as one of the principal mischiefs intended to be redressed by it seems to be, that men had often suffered as traitors for words only; yet the force of this objection will be very much lessened, if we consider, that the principal purport of the said statute of 1 Mary seems to be, to make the 25 Edw. 3. according to the intention of the makers of it, the only standard of treason, and to abolish all subsequent statutes, which had made many offences treason, which were not contained in the said statute of 25 Edw. 3. but no way to extenuate the crimes mentioned in 25 Edw. 3. or to take away the force of any natural exposition thereof; for the first part of the preamble complains of such laws as not only inflicted punishments over severe for the crimes intended to be restrained by them, but were also penned in such a manner,

Foster 205.
1 Hale 111.
115. 323.

as to be often apt to enter the wisest by bare words. But surely this can no way be applicable to 25 Edw. 3. inasmuch as no punishments can be thought extreme for the crimes therein restrained, and there can be no danger from that statute of any man's being punished for unwary or innocent words, inasmuch as there is no colour to say, that any words as such, are punished within that statute, but only the most wicked imagination of the heart, which may be sometimes proved by the evidence of words. And it farther appears from the next part of the preamble of the said statute of 1 Mary that it has an eye only to such statutes as are above mentioned, inasmuch as it complains of persons having suffered shameful deaths for words only, without other opinion, fact or deed, which is very applicable to those many statutes in the time of Hen. 8. as 26 Hen. 8. c. 13. and 35 Hen. 8. c. 3. and some others, which made bare words high treason, many of which were so far from purporting a design against the king's life, that they were scarce otherwise criminal than as they were prohibited by those statutes. But surely this can have no relation to 25 Edw. 3. either in punishing a man for such imaginations of the heart as are most perversely wicked, or in suffering those imaginations to be proved upon him from his own mouth. Also it is farther remarkable, that the enacting clause restrains only such offences, as are made high treason by statutes subsequent to 25 Edw. 3. from being adjudged high treason by words, writing, cyphering, &c. and seems to leave the offences contained in the said statute to the same construction which they had before.

3 Inq. 5. 14.
140.
1 Roll. 106.

Sec. 44. As to the authority of Sir Edward Coke in his third Institute, it is of the less weight, because he is said to have been some time of the contrary opinion.

Sec. 45. Neither does it appear to me, That my lord chief justice Hale was at all of this opinion; for though in the latter edition of his treatise of the Pleas of the Crown, it be said, that compassing by bare words is not an overt-act, &c. yet in the first edition published in the year 1678, it is twice said, that it hath been adjudged that words are an overt-act. (11)

Old Ed. 13. 16.

(11) This great question, whether words only spoken, can amount to an overt act of compassing the king's death, is examined very much at length, and with great perspicuity by lord Hale in his history of the Pleas of the Crown from p. 111. to 126. and 312. to 322. and by Mr. justice Foster from p. 196. to 207. in his discourse on high treason, both of them concluding, against the assertions of Kellogg and the doctors of Hawkins, that bare words are not overt acts of treason, unless uttered in contemplation of some traiterous purpose actually, on foot, or intended, and in prosecution of it.

1 Hale 230. *Sec. 46.* The second kind of high treason, concerning the king's office in the administration of justice, is expressed in the words following. "If a man slay the chancellor, treasurer, or the king's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned

"assigned to hear and determine, being in their places during their offices."

Sec. 47. It hath been holden, that this part of the statute shall not be extended by equity, to any other high officers of state beside these expressly named, nor even to these when they are not in actual execution of their offices, nor to any attempt to kill them, nor even to the actual wounding of them, unless death ensue. (12)

Sum. 17.
3 Inst. 18, 38.
Vide ch. 17.
f. 8.

(12) Therefore the barons of the exchequer, as such, are not within the protection of this act, 1 Hale 231.—neither do the lord keeper or commissioners of the great seal seem to be within it by virtue of the statutes 5 Eliz. c. 13, and 1 W. & M. c. 21. 4 Comm. 84. See vide: 1 Hale 231.

† But by 7 Anne c. 21. f. 8. to slay any of the lords of session or justiciary of Scotland, in the exercise of their office is high treason.

Sec. 48. The third kind of high treason, relating to the king's seal, is said to have been high treason at the common law, and is expressed in the following words, "And if a man counterfeit the king's great or privy seal."

3 Inst. 15.
S. P. C. 2, 3.
1 Hale 170.
187. a

Sec. 49. It hath been holden, that these words extend to the aiders and consenters to such counterfeiting, as well as to the actors.

Kely. 80.
4 Comm. 83.

Sec. 50. But not to an intent or compassing to do it, if it be not actually done.

Sum. 18.

Sec. 51. Nor to the fixing of the great seal to a patent, without a warrant for so doing.

Con. Dalt.
c. 89.

Sec. 52. Nor to the razing of the name of one manor out of a patent, and putting in that of another, nor to any artificial removing of the true writing, and adding matter altogether new: nor, by the better opinion, to the taking off the wax impressed with the great seal from a true patent, and fixing it to a writing purporting a grant from the king.

Kely. 80.
3 Inst. 15.
12 Co. 15, 16, 17.
3 Inst. 15, 16.
2 Keb. 74.
B. Titcas. 3. 17.
48.

Sec. 53. Nor to the counterfeiting of the sign manual, or privy signet. But this is made high treason by the first of Mary, ft. 2. chapter the sixth.

1 Roll. 30. 51.
2 Roll. 50.

† And by 7 Ann. c. 21. f. 9. To counterfeit the seals used and continued in Scotland according to the twenty-fourth article of the union, is high treason.

Sec. 54. The fourth kind of high treason concerning the coin is expressed in these words, "If a man counterfeits the king's money, and if a man bring false money into this realm, counterfeit to the money of England, as the money called lishburgh, or other like to the said money of England, knowing the money to be false, to merchandize or make payment, in deceit of our said lord the king and his people."

Prin. P. L.
133. 143.

In treating hereof, I shall consider, First, The branch relating to the counterfeiting of the king's money. Secondly, That concerning the bringing of false money into the realm, &c.

In treating of the first branch I shall shew, *First*, What degree of counterfeit money will amount to high treason. *Secondly*, What shall be said to be the king's money within this act.

1 Hale 213,
214. 229.

B. Treas. 27.
Sum. 19, 20.
127.

3 Inst. 16.

Con. 6 H. 7 13.

3 H. 7. 10.

2 Inst. 375.

3 Inst. 17.

Brit. f. 10.

Fleta. 1. c. 22.

Kely 33. Con. Dyer 296. & 213. 1 Hale 233.

Sec. 55. As to the point of counterfeiting. It is said, that those who coin money without the king's authority, are guilty of high treason within this act, whether they utter it or not; and that those who have the king's authority to coin money, are guilty of high treason, if they make it of baser alloy than they ought; and that those also are guilty of the same crime, who receive and comfort one who is known by them to be guilty thereof; but that clippers, &c. are not within this statute. (13)

(13) To counterfeit the impression of half a guinea on a piece of gold previously hammered, not round, and not passable in the condition it then was, is not high treason, for the crime is incomplete. 2 Black. 632.

3 H. 7. 10.
Sum. 128.

B. Treas. 19.

1 Hale 214.

373. 375.

Sec. 56. But it seems, that those, who barely utter false money made within the realm, knowing it to be false, are neither guilty of high treason, nor of a misprision thereof, but only of a high misprision: yet by 8 & 9 Will. 3. c. 26. they are, in some cases made guilty of felony, for which see the next chapter.

2 Inst. 577.

3 Inst. 17.

2 Keb. 36.

Dart. c. 89.

1 Hale 195.

192. 210. 10

Sec. 57. As to the second point, *viz.* What shall be said to be the king's money? It seems, That such only as is coined by the king's authority either in gold or silver within the realm, and consequently not brass farthings, &c. shall come under this denomination.

1 Burr 559. 1 Comm. 278. Fof. 227. 12 Mod. 10. Co. Lit. 107. ch. 18. f. 5.

Sec. 58. But the mischiefs intended to be remedied by this statute, having been found by experience not to have been sufficiently redressed by it, as thus restrained, the same have been farther provided for by subsequent statutes.

1 Hale 197.

T. Jones 233.

Sec. 59. For by 1 Mary, sess. 2. c. 6. "If any person or persons falsely forge and counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, and is or shall be current within this realm, by the consent of the crown, they and their counsellors, procurers, aiders and abettors shall be guilty of high treason."

3 Inst. 17.

1 Hale 376.

Sec. 60. And by 14 Eliz. c. 3. "If any person or persons falsely forge or counterfeit any such kind of coin of gold or silver, as is not the proper coin of this realm, nor permitted to be current within this realm, they and their procurers, aid-

"aiders and abettors, shall be guilty of misprision of treason."

Sec. 61. And it is enacted by 5 Eliz. c. 11. s. 2. "That clipping, washing, rounding or filing, for wicked lucre or gain fake, of any the proper monies or coins of this realm, or the dominions thereof,—or of the monies of coins of any other realm allowed and suffered to be current within this realm or the dominions thereof at this present, or that hereafter at any time shall be the lawful monies or coins of this realm, or of the dominions thereof, or of any other realm, and by proclamation allowed and suffered to be current here by the crown, or counselling consenting and aiding therein, shall be deemed to be treason."

And by the 18 Eliz. c. 1. "If any person or persons shall for wicked or lucre gain fake, by any art, ways, or means whatsoever, impair, diminish, falsify, scale or lighten the proper monies or coins of this realm, or any the dominions thereof,—or the monies or coins of any other realms allowed and suffered to be current at the time of the offence committed within England or any the dominions of the same by the proclamation of the crown, their counsellors, consenters and aiders shall be adjudged offenders in high treason, and lose and forfeit all their goods and chattels absolutely, and all their lands, tenements and hereditaments during his or their natural lives only: but no corruption of blood or loss of dower."

Sec. 62. And by 8 & 9 Will. 3. c. 26. made perpetual by 7 Anne c. 25. "Whoever (other than the persons employed in the mint) shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any puncheon, counterpuncheon, matrix, stamp, dye, pattern, or mould (14) of steel, iron, silver or other metal or metals, or of spaud, or fine founders earth, or sand, or of any other materials whatsoever, in or upon which there shall be, or be made or impressed, or which will make or impress (15) the figure, stamp, resemblance,

1 Hale 321, 328.
This offence was first created by 3 Hen. 6. c. 6. *Prin. P. 1.*

Everything necessary to show the defendant had no authority, must be negatively averred in an indictment on this statute.
Add. P. L. 145.
For the form of indictments on this statute, *see* C. Cir. Com. 167-171.

(14) Hugh Lennard was indicted for having in his possession "one mould of lead."—And, as the words "pattern or mould," are omitted in the last clause of this section of the act, it was submitted to the opinion of the judges.—First, whether "a mould" is comprized under the general words "other tool or instrument above mentioned." And secondly, if it be so comprized, whether it should not be described in the indictment as a "tool or instrument," mentioned in the statute.—They were unanimous, First, that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprized under the general words.—And Secondly, that as it is expressly mentioned by name in the first clause, with respect to the making or mending, it need not be averred to be a tool or instrument mentioned. Black. & 9.

(15) So also in the same case, a doubt arose whether a mould, having only the resemblance of the coin invented, was not an instrument which would make and impress the resemblance rather than one on which the resemblance was made and impressed, (which was the way it was laid in this indictment,) the statute seeming to distinguish between such as will make or impress the similitude, &c. as a matrix, dye or mould,—and such on which the same is made or impressed, as a puncheon, &c.—A great majority of the judges thought the indictment good, because the stamp of the coin was certainly impressed on the mould, but they thought it would have been more accurate had it averred "a mould that would make and impress the similitude, &c." And in this opinion, some who otherwise abated acquiesced.—Black 821.—But an instrument which would make or impress the figure of only part of one side of the coin, is not within the statute. B. R. H. 371.

This is an offence at common law, and punishable as a misdemeanour. B. R. H. 371. Str. 1074.

But an offender upon lands, forfeit his lands. Salk.

Prosecution to be in three months, s. 9.

“ or similitude, of both, for either of the sides or flats of any gold or silver coin current within this kingdom.—Or shall knowingly make or mend, or begin or proceed to make or mend, or assist in the making or mending, of any edger or edging tool, instrument or engine, not of common use in any trade, but contrived for making of money round the edges with letters, grainings, or other marks or figures, resembling those on the edges of money coined in his majesty’s mint—Or any press for coinage.—Or any cutting engine for cutting round blanks, by force of a screw, out of flatted bars of gold, silver, or other metal.—or shall knowingly buy or sell hide or conceal, &c. without lawful authority or sufficient excuse for that purpose, knowingly have in their houses, custody or possession any such puncheon, counterpuncheon, matrix, stamp, dye, edger, cutting instrument or other tool or instrument before mentioned—their counsellors, procurers, aiders and abettors, shall be adjudged guilty of high treason—But without corruption of blood, or loss of dower.”—And by 7 Anne. c. 25. s. 2. “ the prosecution of such as offend against this act by making or mending, or beginning or proceeding to make or mend any coining tool or instrument therein prohibited or by making of money round the edges with letters or grainings may be commenced at any time within six months.”

And by par. 2. “ Whoever shall knowingly convey or assist in conveying out of the mint, any tool or instrument used for or about the coining of monies there, or any useful part of such tools or instruments.—Or whoever (other than the persons employed in the mint,) shall mark on the edges any the current coin of this kingdom, or of the diminished coin of this kingdom,—or any counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures like unto those on the edges of money coined in his majesty’s mint, their counsellors, procurers, aiders and abettors shall suffer death as in case of high treason.”—And by par. 4. “ whoever shall colour, gild or case over with gold or silver, or with any wash, or materials producing the colour (16) of gold or silver, any coin resembling any the current coin of this kingdom.—or any round blanks of base metal, or of coarse gold, or coarse silver of a fit size and figure to be coined into counterfeit milled money resembling any the gold or silver coin of this kingdom.—Or shall gild over any silver blanks of a fit size and figure, to be coined into pieces resembling the current gold coin of this kingdom. their counsellors, procurers, aiders and abettors shall suffer death as in high treason.

(16) It has been resolved upon this clause of the statute, that it is immaterial whether the colouring is effected immediately, by some external and superficial application, or arise latently by extraction from the application of *Aqua fortis*, or other chymical power. *Rex v. Lacy and Parker*, O. B. 6. Dec. 1776.

Stat. 63. And by f. 5. If any tool, instrument or engine used or designed for coining or counterfeiting gold or silver monies, or any part of such tool or engine, shall be hid or concealed in any place, or found in the house, custody or possession of any person not then employed in the mint, the same may be seized and carried forthwith to some justice of the county or place to be produced in evidence at the trial of the offender; and then defaced and destroyed.— And all false money which shall be so produced, shall be cut in pieces,

Cro. Cir. Com. 171.

Stat. 64. † And by 15 Geo. 2. c. 28. it is enacted, “ That if any person whatsoever, shall wash, gild, or colour any of the lawful silver coin, called a shilling, or a sixpence, or any counterfeit (17) or false shilling or sixpence, or add to, or alter the impression, or any part of the impression of either side of such lawful or counterfeit shilling or sixpence, with intent to make such shilling or sixpence resemble or look like or pass for a piece of lawful gold coin called a guinea or a half guinea respectively — Or shall file or any wise alter, wash, or colour any of the brass monies called half-pennies or farthings, or add to, or alter the impression, or any part of the impression of either side of a halfpenny or farthing, with an intent to make such halfpenny or farthing resemble, or look like, or pass for a lawful shilling or sixpence respectively. Such offenders, their counsellors, aiders, abettors and procurers shall be guilty of high treason.”

For the rewards given by statute for the apprehending and convicting of felons. *vide* b. 2. c. 12. f. 25. — And for discoverers who are intitled to pardon. b. 2. c. 37. f. 4.

(17) The counterfeit money must be like the true money; for the word counterfeit implies resemblance or likeness; and without it, there is very little danger of imposition or fraud. 1 Hale 184. 215. 5 Bac. Abr. 129.

Stat. 65. As to the second branch, concerning the bringing false money into the realm, the following particulars are observable. First, That the money so brought must be counterfeited according to the similitude of English money. But by 1 & 2 Phil. & Mar. c. 11. “ It is made high treason to bring into the realm money counterfeited according to the similitude of foreign coin current here, to the intent to merchandize therewith.”

1 Hale 225. 228. 229. 317. Sum. 21. S. P. C. 3. Foster 227.

Stat. 66. Secondly, That it must be brought by one, who knows it to be false.

Stat. 67. Thirdly, That it must be brought from a foreign nation, and not from Ireland, or other place subject to the crown of England, for tho’ to some purposes they be distinct from the realm of England, and consequently money brought from thence may, within the letter of the statute, be said to be brought into the realm, yet inasmuch as the counterfeiting is punishable there by the laws of our king, as much as in England, the bringing money from such places has been construed to be no more within the act than if they were actually in England.

1 Hale 225. 226. 317. 318. 7. 10. S. P. C. 3. 3 Inst. 18. Sum. 12. B. Treas. 10. Dalt. 89. f. 225.

Sum. 21.
3 Inst. 18.
ch. 18. f. 4.

Sec. 68. Fourthly, That the bare uttering of such money here, by one who brought it not over, is not within this branch.—But by force of an ancient statute, if false money be found in the hands of a suspicious person, he may be arrested till he have found his warrant.

3 Inst. 18.
Sum. 21.

Sec. 69. Fifthly, That it is not necessary that such false money be actually paid away or merchandized withal, for the words are, to merchandize or make payment, &c. which only import an intention to do so, and are fully satisfied whether the act intended be performed or not. But *quære*, because both Coke and Hale seem to hold otherwise. However it is clear, that bringing over money counterfeited according to the similitude of foreign coin is treason within 1 & 2 Phil. & Mar. c. 11.

Sec. 70. Also in the said statute of 25 Edw. 3. there is this clause, “ And because that many other like cases of treason may happen in time to come, which a man cannot think nor declare at this present time, it is accorded, that if any other case, supposed treason, which is not above specified, doth happen before any justices, the justices shall tarry without any going to judgment of the treason, till the cause be shewed and declared before the king, and his parliament, whether it ought to be judged treason or other felony.”

1 Hale 308.
3 Inst. 8.
12 Co. 16.

Sec. 71. By virtue of this clause, many offences which are not high treason within this statute, as the murder of an ambassador, &c. were declared by the parliament to be high treason. But these and all other such like declarations are made void by 1 Mary c. 1. And it seems that the parliament have no such power at this day by virtue of the said clause, inasmuch as the said statute of 1 Mary expressly enacts, “ That no offence shall be deemed high treason, but only such as is declared and expressed to be so by 25 Edw. 3.” and takes no notice of the said clause relating to the parliament.

AND now we are come to offences, which have been made high treason since the said statute of 1 Mary. And in treating of these, we shall consider, First, Offences in upholding or favouring the power of the pope. Secondly, Offences against the protestant succession. Thirdly, Offences of lifting men without the king's licence.

And first, Offences in upholding or favouring the power of the pope seem reducible to the following heads: *First*, Extolling the pope's power. *Secondly*, Putting in ure popish bulls. *Thirdly*, Perverting others, or being perverted to popery. *Fourthly*, Receiving popish orders or education in popish seminaries, and not submitting, &c. *Fifthly*, Refusing a second tender of the oaths.

Sec. 72.

Sect. 72. And first, The offence of extolling the pope's power is made high treason by 5 Eliz. c. 1. s. 2. 10. by which it is enacted, "That if any person within the queen's dominions, shall by writing, cyphering, preaching or teaching, deed or act, advisedly and wittingly hold or stand with, extol or set forth, maintain or defend, the jurisdiction of the bishop of Rome heretofore claimed in this realm, or by any speech, open deed or act, willingly or advisedly attribute any such authority to the see of Rome, he shall be guilty of a *præmunire* by the first offence, of high treason by the second, but without corruption of blood or loss of dower."

Sec 1 Hale 332.
332.
Prin. P. L.
144.

Sect. 73. It has been holden, That he, who knowing the effect of a book written beyond sea, brings it over and secretly sells it, and also, That he, who by report hearing the contents thereof commends it, and also, That he, who knowing its contents secretly conveys it to a friend with an intent to pervert him, is in danger of the statute; and it has been resolved, That he, who having read the book does afterwards in discoursing of it, allow it to be good; and also, That whoever writes or prints such a book, and after publishes it, is clearly guilty: but it is said, That he, who having heard of the contents, barely buys and reads the book, is not within the statute.

Dyer 232.

Sect. 74. It has also been holden, That if one who is convicted and condemned for an offence of this nature, being afterwards demanded by the judges, whether he be still of the same opinion? answer, that he is, he is guilty of high treason, as having advisedly maintained the pope's power a second time.

Two of the
judges. dissented
from this opinion.
Dav. 46.

Sect. 75. The second offence of this kind, viz. That of putting in ure a popish bull, is made high treason by 13 Eliz. c. 2. s. 2, 3. By which it is enacted, "That if any within the queen's dominions shall put in ure any bull or instrument of absolution or reconciliation obtained from the see of Rome, or shall take upon him by colour thereof, to absolve or reconcile any person, or to grant or promise any absolution or reconciliation, or shall willingly receive any such absolution or reconciliation, or shall obtain from the see of Rome any bull or writing whatsoever, or publish, or any ways put the same in ure, he is guilty of high treason. And by s. 4. accessaries after the offence incur a *præmunire*. And by s. 5, 6. Those who within six weeks disclose not an offer of such bulls, &c. to some privy councillor, &c. are guilty of a misprision of treason."

Prin. P. L.
144.

Sect. 76. The third offence of this kind, viz. That of perverting others, or being perverted to popery, is made high treason by 23 Eliz. c. 1. s. 2. & 3 Jac. 1. c. 4. s. 22, 23. by which it is enacted, "That if any one shall pretend to have

1 Hale 337, 338.
11 Mod. 50.
114.
Rex v. Bolton.
Mich. 26 Geo.

Form of indictment. Cro. Cir. 573.

“ power, or shall put in practice to withdraw a subject from his natural obedience to the king, or to withdraw them for that intent, to the Romish religion, or to move to promise any obedience to any foreign power, or to do any overt-act to that intent, or to reconcile one to the see of Rome, and if any person shall by any means be willingly withdrawn, or promise obedience as aforesaid, he is guilty of high treason.”

Cowley 127.

Stat. 77. But by 3 Jac. 1. c. 4. “ If any person who is reconciled to the see of Rome beyond the seas, return into the realm and submit himself, &c. and take the oaths within six days after his return, he is excused.”

The case of Campion the Jesuit and others. Savil 3.

Stat. 78. It seemeth that the bare pretending to such a power, without any farther act in endeavouring to persuade persons from their allegiance, or the bare endeavouring so to persuade them, without any pretence of such a power, is high treason within these acts.

Haile 336, 337.

Stat. 79. The fourth offence of this kind, viz. That of receiving popish orders or education, &c. is made high treason by 27 Eliz. c. 2. s. 3. by which it is enacted, “ That if any ecclesiastick, born in the queen’s dominions, and ordained or professed by popish authority, shall remain in the queen’s dominions, or come from beyond sea, and not submit to some bishop or justice of peace within three days, and take the oaths, &c. he shall be guilty of high treason.”

Stat. 80. And by s. 15. “ If any subject, not being an ecclesiastick, shall not return from a popish seminary within six months after a proclamation to that purpose in London, and submit, &c. within two days, he shall be guilty of high treason, whenever he shall otherwise return.”

Stat. 81. And by s. 13. “ If any subject shall know that any such priest is within the realm, and not discover him to some justice of peace, &c. within twelve days, he shall be fined and imprisoned at the queen’s will; and if any justice of peace, &c. to whom such matter shall be discovered, shall not give information to some of the privy council, &c. within twenty-eight days, he shall forfeit two hundred marks.”

Pop. 94.

Stat. 82. In the construction of this statute it hath been resolved, First, That in an indictment grounded on this statute against a priest remaining here beyond the time limited by the statute, it must be alledged, that he was born in the realm, &c. and also that he was ordained, &c. by authority challenged or pretended from the see of Rome; but that there is no need to shew in what place in particular he was born, or whether he were ordained within the realm, or beyond sea.

Ray. 377.

Stat. 83. Secondly, That one in popish orders, being in a ship in order to go to Ireland, and driven by a storm into England, and immediately apprehended, is not guilty of high treason

treason within this act; for his design of going to Ireland was prevented, & *nil efficit conatus, nisi sequatur effectus*, and he was forced into England by the act of God, and against his will; neither can he be said to remain here within the intent of the statute, because he was compelled to it by reason of the prosecution.

Sec. 84. The fifth offence of this nature, viz. that of refusing a second tender of the oaths, is made high treason by 5 Eliz. c. 1. s. 11, 2 & 20. by which it is enacted, "That if any person, who shall have a charge, cure, or office in the church, or an office or ministry in an ecclesiastical court, or if any person who shall wilfully refuse to observe the rites of the church of England, after having been admonished by the ordinary, &c. or that shall say or hear private mass, &c. shall refuse a second tender of the oaths, he shall be guilty of high treason, but without corruption of blood."

Vide infra,
c. 19.
See 1 W. & M.
c. 8.

Sec. 85. Secondly, offences against the protestant succession made high treason are twofold: First, denying the power of the parliament to limit the succession of the crown, which is made high treason, by 4 Annæ c. 8. s. 1, 2. and 6 Annæ c. 7. s. 1, 2. whereby it is enacted, "That whoever shall maliciously, advisedly, and directly, by writing or printing, declare, maintain and affirm, that the pretended prince of Wales, or any other, hath any right or title to the crown, otherwise than according to 1 Will. & Mary, s. 2. c. 2. or 11 & 12 Will. 3. c. 2. or that the kings of this realm, by authority of parliament, are not able to make laws to limit and bind the crown and the descent and government thereof, shall be guilty of high treason, and that those that maliciously and directly affirm the same by preaching, teaching, or advised speaking, shall be guilty of a *premunire*."

Prin. P. L.
145.
See the case of
John Mathews,
convicted and
executed upon
this statute,
9 St. Tr. 115.
O. B. Off. Set.
Sept. 1719.

Secondly, Endeavouring maliciously, advisedly, and directly to hinder any person, who shall be next in succession, according to 1 Will. & Mary, and 12 Will. 3. which is made high treason by 1 Annæ, c. 17.

Sec. 86. It is also enacted by 13 Will. 3. c. 3. it is recited, "That the said pretended prince of Wales had assumed the title of king of Great Britain, in manifest violation of the lawful and rightful title to this realm; and that the said traitor may be brought to condign punishment," it is ordained, "that he stand and be convicted and attainted of high treason."—And it is also enacted, "That if any subjects of the crown of England, shall hold any correspondence whatsoever with the said pretended prince of Wales, or by 17 Geo. 2. c. 39. with the sons of the said pretender, or knowingly with any person employed by him or them,

or shall remit or pay any money for his or their use or service, shall be guilty of high treason."

Vide Will. 3.
c. 1.
1 Hal.
340. and
for the offence
of enlisting men
for the
of any foreign
prince vide
next chapter
f. 11.

Stat. 87. It is also further enacted by 2 & 3 Annæ, c. 20.
f. 34. "That if any officer or soldier shall hold correspondence
"with any rebel or enemy, or give them advice or intelli-
"gence either by letters, messages, signs, tokens, or other-
"wise, or shall treat, or enter into any condition with them,
"without authority so to do, he shall be guilty of high
"treason."

CHAPTER THE EIGHTEENTH.

OF FELONIES MORE IMMEDIATELY AGAINST THE KING.

FELONIES more immediately against the king are of five kinds:—First, Offences relating to the coin or bullion.—Secondly, Offences against the king's council.—Thirdly, The offence of passing beyond sea to serve a foreign prince.—Fourthly, Imbezilling the king's armour.—Fifthly, The offence of relieving a popish priest.

Felonies relating to the coin or bullion (1) are of three kinds:—First, The offence of debasing it.—Secondly, The offence of unlawfully diminishing it.—Thirdly, The offence of endeavouring by extraordinary means to increase it.

Bullion is the ore or metal whereof gold is made, and signifies with us either gold or silver in the mass. 9 Edw. 3. c. 2. The king by virtue of his prerogative is entitled to all mines from which he can produce. 2 Inst. 577. Plow. 336. in order to supply materials for the coin of the kingdom. 1 Geo. 1. c. 24. This coin must be made of sterling or standard metal, 25 Edw. 3. (Crep. 279.) It consists at present of two carrats of copper, melted with twenty-two carrats of fine gold. And eighteen penny weights of copper, melted with eleven ounces and two penny weights of fine silver respectively. Wajd's Math. 118. 12 Geo. 2. c. 26. Even the king's prerogative, Sir Edward Coke thinks, does not extend to the alteration of the standard. 2 Inst. 577. Traie says, it is neither safe nor honourable to debase the coin below sterling, 1 vol. 197. and Blackstone apprehends that in legitimating even foreign coin, the value should be fixed comparatively with our own standard, or the consent of parliament will be necessary, 1 Comm. 278. And the legislature appears to have been ever extremely anxious to preserve the standard of the coin and bullion pure and unadulterated. Vide 13 & 14 Car. 2. c. 31. 8 Will. 3. c. 8. 6 Geo. 1. c. 11. 12 Geo. 2. c. 26. 9 Geo. 3. c. 37. 14 Geo. 3. c. 42. 16 Geo. 3. c. 46. 18 Geo. 3. c. 45. and the references there cited.

4 Geo. 1. 98.

Stat. 1. And first, The offence of debasing the coin or bullion was provided against by many ancient statutes, which seem to be obsolete at this day; for the importation of ill money was made felony by 17 Edw. 3. n. 15. (which was never printed,) and so was the payments of blanks, (which were made of base alloy,) by 2 Hen. 6. c. 9. and the coining or

3 Inst. 92, 93.

or bringing in galley halfpence, feskins or doydekins, by 3 Hen. 5. c. 1. However it is made high treason to bring in false money, &c. by 25 Edw. 3. and 1 & 2 Ph. & Mar. c. 11.

Self. 2. And it is enacted by 8 & 9 Will. 3. c. 26. s. 6. made perpetual by 7 Anne, c. 25. s. 3. "That whoever shall
 " blanch copper for sale, or mix blanch'd copper with silver,
 " or knowingly buy or sell, or offer to sale blanch'd copper
 " alone or mixed with silver, and shall knowingly and fraudu-
 " lently buy or sell, or offer to sale any malleable composition or
 " mixture of metals or minerals which shall be heavier than
 " silver, and look, and touch, and wear like standard gold,
 " but be manifestly worse than standard; or shall take, re-
 " ceive, pay, or put off any counterfeit milled money, or
 " any milled money whatsoever unlawfully diminished, and
 " not cut in pieces at or for a lower rate or value than the
 " same by its denomination doth or shall import, or was
 " coined or counterfeited for, shall be guilty of felony."

4 Comm. 98.
1 Hale 214.

Self. 3. And by 9 & 10 Will. 3. s. 21. "Any person to whom
 " any silver money, and by 13 Geo. 3. c. 71. any person to whom
 " any gold money, shall be tendered, which shall be diminished
 " otherwise than by reasonable wearing, or which from the ap-
 " pearance of it, he shall suspect to be counterfeited, may cut,
 " break or deface the same; but if the same shall afterwards
 " appear to have been lawful money, the person who cut, &c.
 " shall take the same, at the rate it was coined for; and every
 " question respecting the validity of such coin, shall be finally
 " determined by the chief magistrate of the place.—And by
 " 8 & 9 Will. 3. c. 26. s. 5. such spurious money, produced
 " in a court of justice, shall be destroyed in open court.

Self. 4. It is also further enacted, by 15 Geo. 2. c. 28. s. 2. "That whoever shall utter or tender in payment any false or
 " counterfeit money knowingly, shall suffer six months impri-
 " sonment, and find sureties for good behaviour for six months
 " more; and on being convicted a second time for the like of-
 " fence, shall suffer two years imprisonment and find sureties,
 " &c. for two years more; and if the same person shall offend
 " in like manner a third time, he shall suffer death without
 " clergy." It is also further enacted by s. 3. "That who-
 " ever shall knowingly utter or tender in payment any false
 " or counterfeit money, and shall either the same day, or
 " within the space of ten days then next, utter or tender in
 " payment any more or other false or counterfeit money; or
 " shall at the same time have in his custody, one or more
 " pieces of counterfeit money besides what was so uttered or
 " tendered, shall suffer one years imprisonment and give securi-
 " ty, &c. for two years more; and if such person shall offend
 " in like manner a second time, he shall suffer death without
 " clergy, provided the prosecution be within six months."—
 " And it is further enacted by s. 4. "That whoever shall make,
 " coin, or counterfeit any brass or copper money called a
 " halfpenny

1 Hale 195.
211.
1 Burn. 367.

“ halfpenny or a farthing, their aiders, &c. shall suffer two years imprisonment, and find-surety, &c. for two years more.”

Sec. 5. And it is further enacted, by 11 Geo. 3. c. 40. “ That whoever shall make, coin, or counterfeit any of the copper monies of this realm commonly called an halfpenny or a farthing, his counsellors, aiders, abettors, and procurers shall be adjudged guilty of felony.” — And it is further enacted by s. 2. “ That whoever shall buy, sell, take, receive, pay, or put off any counterfeit copper money, not milled down or cut in pieces, at or for a lower rate or value, than the same by its denomination, doth or shall import or was counterfeited for, shall be guilty of felony.” — And by s. 3. “ Any one justice of the peace, on complaint upon oath of one witness by warrant under his hand may cause the houses, &c. of suspected counterfeiters to be searched for the tools and implements for coining such copper monies, in order to produce them in evidence against the offenders as aforesaid.”

O. B. 1784.
p. 484

Pop'l.
Hob.

3 Inst. 92, 93.

Sec. 6. Secondly, The offence of diminishing the coin or bullion of the kingdom has been always thought to be of very ill consequence, as tending to impoverish the nation, and to embarrass trade, and with an eye to those inconveniences it was made felony by 17 Edw. 3. n. 15. (which was never printed) to transport silver, except plate carried over by great men to serve their houses; also the transportation thereof was prohibited by many other statutes, as 27 Edw. 3. c. 14. 5 Rich. 2. c. 2. 2 Hen. 4. c. 16. 2 Hen. 6. c. 6. and 3 Hen. 8. c. 1. But this general restraint being found by experience to be inconvenient to trade; which by exporting money to one market may bring back such goods, as will more than make up the loss, from another, it was enacted by 15 Car. 2. c. 7. s. 12. “ That any person might export any foreign coin or bullion without duty, first making an entry thereof in the custom-house.”

Sec. 7. But this licence having been often abused by the transportation of such silver, which having been coined into English money or wrought into plate, was afterwards melted down into the form of foreign coin or bullion, it was, in order to prevent this mischief, enacted by 6 & 7 Will. 3. c. 17. s. 3. “ That none shall cast or make ingots or bars of silver in imitation of Spanish under pain of five hundred pounds.” And it is further enacted by the said statute, s. 5. “ That no person shall transport, or cause to be transported, any molten silver, but only such as shall be marked or stamped at Goldsmith's Hall, &c. nor even that without a certificate under the hands of one of the wardens of the Goldsmith's Company, that oath hath been made by the owner or owners thereof, and likewise by one credible witness, that the same is lawful silver; and that no part thereof was (before the same was molten) the
“ current

“ current coin of this realm, nor clippings thereof, nor plate wrought within this kingdom, &c.”

Seet. 8. Also it is farther enacted, *f. 6.* “ That any officer of the custom-house may seize any molten silver, which shall be put on board any vessel, without having such mark or stamp, and also such certificate, as is above mentioned.”

Seet. 9. And it is farther enacted, *f. 7.* “ That if any broker, not being a trading goldsmith, or refiner of silver, shall buy or sell any bullion or molten silver, he shall suffer imprisonment for six months without bail.”

Seet. 10. Also it is farther enacted, *f. 13, 14.* “ That if a doubt shall arise upon bullion shipped to be exported, whether the same be English or foreign, the proof shall lie upon the owner, &c. And that if any person shall enter or ship any bullion, by the said act allowed to be exported, other than in the name of the true owner, proprietor or importer, the exporter shall forfeit the same, or the full value thereof.”

Seet. 11. Also it is farther enacted by 7 and 8 Will. 3. *c. 19. f. 6.* “ That no person shall ship or cause to be shipped, any molten silver, or bullion whatsoever, unless a certificate be first had and obtained from the court of the Lord Mayor and Aldermen of the city of London, oath having been made, before the said court, by the owners and two witnesses, that the same was and is foreign bullion, and that no part thereof was the coin of this realm or the clippings thereof, nor plate wrought within the kingdom, &c. which oath, &c. the said court shall (circumstantially) certify to the commissioners of the customs, before any coquet shall be granted for shipping the same; on pain to the owner of loss of the goods and forfeiting double the value. To the captain the ship, and 200 l. and if in the king's service, the loss of command. To the coquet officer 200 l. and loss of office.”

By 20 Geo. 3. *c. 18.*
Gold and silver coin may be exported to Ireland.

Seet. 12. Thirdly, The endeavours of some persons in making use of extraordinary methods for the producing of gold and silver, were found by experience to be so prejudicial to the publick, both from the lavish waste of many valuable materials, and also from the ruin of many families, which had been occasioned by such useless expences, that it was thought necessary to put a check to such practices by some severe law, and for that purpose it was made felony, by 5 Hen. 4. *c. 4.* “ To multiply gold or silver, or to use the art or craft of multiplication.” And it was holden, That the practising to find out the Philosophers Stone, by which it is imagined that all metals may be made gold, was felony within this statute: but this restraint having been found to have

1 Hale 644.
Dyer 83.

have no other effect, upon the unaccountable vanity of those who fancied such attempts to be practicable, but only to send them beyond sea, to try their experiments with impunity in other countries, the statute of 5 Hen. 4. was at last wholly repealed by 1 Will. & Mary c. 30.

4 Comm. 100.
3 Comm. 332.
Ante ch. 17.

Sec. 13. As to the second kind of felonies more immediately against the king, viz. those which are against his council, it is enacted by 3 Hen. 7. c. 14. "That if any sworn servant in the chequer-roll of the king's household, under the state of a lord, make any confederacy, compassing, conspiracy or imagination with any person, to destroy or murder the king, or any lord of this realm, or any other person sworn to the king's council, he shall be guilty of felony."

1 Hale 230.
4 Com. 84.

Sec. 14. And it is farther enacted by 9 Annæ, c. 16. "That if any person shall attempt to kill, assault, strike or wound any privy counsellor in execution of his office, he shall suffer as a felon without clergy."

3 Inst. 80.
Dalt. c. 107.
Cawl. 181.
(a) N. B. This oath of obedience is taken away by 1 Will. and Mary, sess. 1. c. 8. s. 2. and the new oaths of allegiance and supremacy enjoined in the r. thereof. Vide c. 10. s. 41.

Sec. 15. As to the third offence of this kind (viz.) That of passing beyond sea to serve a foreign prince, it is enacted by 3 Jac. 1. c. 4. s. 18, 19, 20, 21. "That every subject, who shall go out of the realm to serve any foreign prince or state, or shall pass over the seas, and there voluntarily serve any such foreign prince or state, not having before his going taken the oath of obedience (a) shall suffer as a felon; and that if any gentleman, or person of higher degree, or any person who hath born any office or charge in camp or army, shall go out of the realm to serve such foreign prince, &c. without being bound with two sureties in a bond, conditioned, that he shall not be reconciled to the see of Rome, nor enter into any conspiracy against the king, he shall be a felon."

Sec. 16. + And it is enacted by 9 Geo. 2. c. 30. "That if any subject of the crown of Great Britain shall within Great Britain or Ireland, enlist or enter himself, or if any person shall procure any subject of his majesty, to enter or enlist himself, or hire or retain such person with an intent to cause him to enlist or enter himself, or procure any subject to go beyond the seas, or embark with an intent, and in order to be enlisted to serve any foreign prince, &c. as a soldier, without licence so to do under the sign manual, (although no enlisting money hath been or shall be actually paid to or received by him, 29 Geo. 2. c. 17. s. 4.) such offender shall be guilty of felony without clergy.—Unless within fourteen days he voluntarily discover upon oath the person by whom he was so enlisted, inviegled or enticed as aforesaid, so as he may be apprehended and convicted."

Sec. 17.

Sett. 17. † Also it is further enacted by 29 Geo. 2. c. 17. "That if any subject of the crown shall take or accept of any military commission or otherwise, enter into the military service of the French king, as a commissioned or non-commissioned officer with such licence as aforesaid, he shall suffer death as a felon without clergy."

And it is also enacted, f. 5. "That if any subject shall accept of commissions in the Scotch brigade, in the service of the States General, &c. he shall, within six months from the date of his commission, take and subscribe the oaths of allegiance and abjuration, and transmit a certificate thereof to the Secretary at War, &c. or on default thereof shall forfeit five hundred pounds, one moiety to the king, the other to the prosecutor, &c."

And it is further enacted by 1 Geo. 1. c. 47. "That if any person shall persuade a soldier to desert, he shall forfeit the sum of forty pounds, suffer six months imprisonment, and be set on the pillory."

Sett. 18. As to the fourth offence of this kind, viz. That of imbezilling the king's armour, it is enacted by 31 Eliz. c. 4. "That if any person having the charge or custody of the king's armour, ordnance, or munition, &c. or of any victuals provided for the victualling of any soldiers or mariners, &c. shall for lucre and gain, or wittingly, advisedly and of purpose to hinder or impeach the king's service, imbezil, purloin, or convey away any of the same armour, &c. to the value of twenty shillings, he shall be judged guilty of felony." But such offender must be prosecuted within the year next after the offence done; neither shall he forfeit his hereditaments any longer than during his life; nor shall his blood be corrupted, or his wife lose her dower.

and punishment of peculations under the value of 20s. Vide 9 & 10 Will. 3. c. 25. 9 Geo. 1. c. 28. 17 Geo. 2. c. 40. f. 10. 9 Geo. 3. c. 30. f. 15.

Vide also 18 Hen. 6. c. 19. 5 Eliz. c. 5. 2 & 3 Edw. 6. c. 2. by which desertion in time of war is made a capital crime.

For the offence and punishment of seducing artificers, &c. Vide Index title Artificer.

4 Comm. 101. 4 Burn 254. 3 Inst. 78. Cawley 90. The benefit of clergy is taken from this offence and from the offence of stealing the king's naval stores, to the value of twenty shillings, by 22 Car. 2. c. 5. And for the preservation of the stores, and the mode of trial 41. 5 Geo. 1. L. Ray. 1104.

Sett. 19. And it is also enacted by 12 Geo. 3. c. 24. "That whoever shall either within this realm, or in any of the countries or places thereunto belonging, wilfully and maliciously set on fire and burn, or otherwise destroy, or shall cause the same to be done, or shall aid or assist in the setting on fire, burning or otherwise destroying of any of his majesty's ships or vessels of war, whether on float or building in any of his majesty's dock yards, or building or repairing by contract in any private yards for the king's use.—Or any of his majesty's arsenals, magazines, dock yards, rope yards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there placed, for building, repairing, or fitting out of ships or vessels; —Or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places "where

“ where an such stores or ammunition shall be kept or deposited, shall suffer death without clergy.”

Sect. 20. And it is also enacted by 22 Geo. 2. c. 33. f. 24. “ That every person in the fleet who shall waste, imbezil, or not carefully preserve any powder, shot, ammunition or other stores and provisions, their abettors, buyers and receivers, (being persons subject to naval discipline), shall suffer such punishment as by a court martial shall be found just in that behalf.”—And by f. 25 “ Every person in the fleet who shall unlawfully burn or set fire to any magazine, or store of powder, or ship, boat, ketch, hoy or vessel, or tackle, or furniture thereunto belonging, not then appertaining to an enemy, pirate or rebel, on conviction by court martial, shall suffer death.”

Sect. 21. As to the fifth offence of this kind, viz. That of relieving a popish priest, it is enacted by 27 Eliz. c. 2. f. 4. “ That whoever shall wittingly and willingly receive, relieve, comfort, aid or maintain any Jesuit, seminary or other popish priest, &c. being at liberty or out of hold, knowing him to be such a Jesuit, &c. shall for such offence be adjudged a felon without benefit of clergy.”

CHAPTER THE NINETEENTH.

OF PRÆMUNIRE.

For the history of præmunire, see 4 Comm. c. 5.

OFFENCES more immediately against the king, not capital, come generally under the titles of *præmunire*, misprision, and contempts. In treating of *præmunire* I shall consider,—First, What offences come under this notion,—Secondly, How they are punished.

And first, Offences coming under the notion of *præmunire*, seem to be reducible to the following general heads; First, Offences against the prerogative of the crown. Secondly, Offences against the authority of the king and parliament..

Those of the first kind seem to come under the following particulars; 1. Making use of papal bulls. 2. Derogating from the king's common law courts. 3. Appealing to Rome from any of the king's courts. 4. Exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese. 5. Refusing to elect or consecrate the person nominated by the king to a bishoprick. 6. Maintaining the pope's power. 7. Bringing in *Agnus Dei*. 8. Contributing to the maintenance of a popish seminary. 9. Refusing the oaths.

Sect. 1. But inasmuch as these offences depend chiefly upon statutes made for the preservation of the sovereignty of the crown from the incroachments of the see of Rome, I shall, in order to shew the reasonableness of these laws, take a short view of those usurpations, which made them necessary.

Sect. 2. It is the general opinion, that Christianity was first planted in this island by some of the eastern church, which is very probable, from the antient Britons observing Easter always on the fourteenth day of the month, according to the custom of the east.

Sect. 3. But the Saxons being converted about the year 600. by persons sent from Rome, and wholly devoted to the interest thereof, it cannot be expected that such an opportunity of enlarging the jurisdiction of that see should wholly be neglected.

Sect. 4. And yet Parsons, in his attempt to answer Sir Edward Coke's fifth report concerning the king's ecclesiastical authority, is scarce able to produce any instances of the papal power in this kingdom before the Norman Conquest. Indeed he tells us, that four or five persons were made bishops by the pope at the first conversion, but offers not any example thereof between the year 669 and the conquest; and it is certain, that all bishopricks were then conferred by the king's delivery of a ring and a pastoral staff.

Sect. 5. Neither is he able to produce any instance, that looks like an appeal to Rome before the conquest, except in the case of two bishops, and he is forced to own, that even one of the bishops was deposed by two kings, and could get no relief against either of them, notwithstanding the pope's utmost application in his favour.

Sect. 6. Nor can he shew more than four or five instances of exemptions from ordinary jurisdiction, granted or confirmed by popes to religious houses in those days, which plainly shews that this concurrence was not thought necessary; and it appears, that our ancient kings, of their own authority, exempted some abbeys from episcopal jurisdiction; and it hath always been a received rule, even in the times of popery, that the chancellor shall visit a church of the king's foundation, notwithstanding it be not specially exempted.

Sect. 7. But the pope, having favoured and supported William the First in his invasion of the kingdom, took that opportunity of enlarging his incroachments, and in this king's reign began to send his legates hither; and prevailed at first with Henry the First, and afterwards with king John, to give up the donation of bishopricks; and, in the time of king Stephen gained the prerogative of appeals, and in the time of Henry the Second, exempted all clerks from the secular power.

Sect. 8. Indeed this king did at first strenuously withstand these innovations, and abolished most of them by the constitutions

Div. 83. 88.
Seld. Jan. Ang.
2.
4 Comm. c. 8.

Parsons, c. 6.
p. 12. to 23.
57 t. 60.
Barrow 258. to
262.
1 R. Abr. 882.
1 Inst. 134.
344.
Seld. Ja. Ang.
42, 65.

Parf. c. 6.
p. 29. to 32.
50 to 56.
Barrow 242. to
258.
Seld. Ja. Ang.
59. 67, 68.

Parf. c. 6. p.
37 to 48.
1 H. 7. 25.
21 Ed. 3. 60.
1 Inst. 144.
F. N. B. 42.
27 Ed. 3. 83.
6 H. 7. 14.
2 R. Abr. 230.
231.

Davis. 80.
Dav. 9. 57.
2 Roll. 104.
Pol. 25. 26.
Seld. Ja. Angl.
67.

Seld. Epistolis,
c. 2.
Dav. 91.

tutions of Clarendon: but upon the death of Becket, who, for having violently opposed the king, was slain by some of his servants, the pope got such an advantage over the king, that he was never after able effectually to execute those laws.

Sett. 9. And not long after this, by a general excommunication of the king and people, for several years, because they would not suffer an archbishop to be imposed upon them, king John was reduced to such straits, that he was obliged to surrender his kingdoms to the pope, and to receive them again, to hold of him for the rent of a thousand marks.

2 Inst. 584.
Davis 95.

Sett. 10. And in the following reign of Henry the Third, partly from the profits of our best church benefices, which were generally given to Italians, and others residing at the court of Rome, and partly from the taxes imposed by the pope, there went yearly out of the kingdom seventy thousand pounds sterling.

2 Inst. 580.

Sett. 11. The nation being under this necessity was obliged to provide for the prerogative of the prince and the liberties of the people, by many strict laws. And in the reign of Edward the First, religious houses were prohibited under high penalties, to send any thing to their superiors beyond seas; and it was declared by parliament, that the pope's taking upon him to dispose of English benefices to aliens was an incroachment not to be endured; and soon after these grievances produced those more severe laws against the above mentioned offences of this nature, the particulars whereof are before set forth.

Stat. 6th.
Reg. 64.
3 Inst. 127.
27 Ed. 3. f. 1
c. 1.
38 Ed. 3. f. 1
o. 4.
Stat. 2. c. 1;
7, 4.
Seld. in Flet.
10. 4.
3 Rich. 2. c.
7 Rich. 2. c.
12.
12 Rich. 2.
c. 15.

Sett. 12. And first the offence of making use of papal bulls is made a *præmunire* by many ancient as well as later statutes; for it is enacted by 25 Edw. 3. called the statute of provisors, "That whoever shall, by a Papal provision, disturb any patron to present to a benefice, &c. shall be fined and imprisoned till he make full renunciation, &c." And it is further enacted by 25 Edw. 3. ft. 5. c. 22. "That if any one purchase a provision of an abbey or priory, he shall be out of the king's protection." And by 38 Edw. 3. & 12 Rich. 2. c. 15 & 13 Rich. 2. ft. 2. c. 2. "That whoever shall accept a benefice contrary to 25 Edw. 3. shall be banished." And by 13 Rich. 2. ft. 2. c. 3. "That whoever shall bring a sentence of excommunication against any person, for executing the said statute of 25 Edw. 3. shall suffer pain of life and member." And by 16 Rich. 2. c. 5. "That whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of Rome or elsewhere, any translations, processes, sentences of excommunication, bulls, instruments, or other things, contrary to the tenor of that statute, which touch the king, against him, his crown, his regality, or his realm, or bring them within this realm, or receive them, &c. shall be out of the king's protection and their lands and tenements, goods and chattels forfeited

" 10

“ to the king; and they shall be attached by their bodies,
 “ &c.” And by 2 Hen. 4. c. 3. “ That whoever shall
 “ purchase from Rome a provision of exemption from ordinary
 “ obedience,” and by 2 Hen. 4. c. 4. “ That whoever
 “ shall put in execution bulls purchased by those of the order
 “ of Cisteraux to be discharged of tithes, shall incur the like
 “ penalty.” ~~6~~ 6 offenders of this nature are farther restrained
 by 6 Hen. 4. c. 1. 7 Hen. 4. c. 8. 9 Hen. 4. c. 8. &
 3 Hen. 5. c. 4. By which the statutes above mentioned are
 enforced and explained. And it is farther enacted by 23 Hen.
 8. c. 21. f. 22. “ That whoever shall sue for or execute
 “ any licence, dispensation, or faculty, from the see of
 “ Rome;” and by 28 Hen. 8. c. 16. (by which all bulls,
 “ briefs, &c. heretofore obtained from Rome, are made void.)
 “ That whoever shall use, alledge, or plead the same in
 “ any court, unless they were confirmed by that statute, or
 “ afterwards by the king, shall incur the like penalty.” Yet
 it hath been holden, That the alledging of an ancient bull in
 order to induce another principal matter, whereon to ground
 a title without claiming any thing from the bull itself, is ~~not~~ ^{2 Lev. 251.}
 within this statute.

Sec. 13. By 13 Eliz. c. 2. Those who purchase any
 bull, &c. from Rome, are guilty of high treason. But those
 ancient statutes still continue in force; and it is in the elec-
 tion of the crown to proceed either upon them, or 13 Eliz.
 Also by the said statute of 13 Eliz. “ The aiders, comforters,
 “ and maintainers of such offenders after the offence, to the
 “ intent to uphold the said usurped power, incur a *præmunire*.”

Hale 643.
vide sup. c. 17.
 avis 84.

Sec. 14. The second offence of this nature, *viz.* That
 of derogating from the king's common law courts, is said to
 have been a high offence at common law, and is made a
præmunire by many ancient statutes; for by 27 Edw. 3. c. 1.
 & 38. Edw. 3. of provisors, “ If any subject draw any out of
 “ the realm in plea, whereof the cognizance pertains to
 “ king's court, or of things whereof judgments be given in
 “ the king's court, or sue in any other court, to defeat or
 “ impeach the judgments given in the king's court, he shall
 “ be warned to appear, &c. in proper person, at a day con-
 “ taining the space of two months; at which, if he appear
 “ not, he and his proctors, &c. shall be put out of the
 “ king's protection, his lands and chattels forfeited, his body
 “ imprisoned and ransomed at the king's will, &c.”

2 R. Ab. 176.
 Rait. 406.
 B. 2. c. 48. f. 9.
 3 Inst. 125.
 B. Prem. 5.

Sec. 15. And by 16 Rich. 2. c. 5. “ Both those who
 “ shall pursue or cause to be pursued in the court of Rome
 “ or elsewhere any processes or instruments, or other things
 “ whatsoever which touch the king, against him, his crown,
 “ and regality, or his realm, and also those who shall bring,
 “ receive, notify, or execute them, and their abettors, &c.
 “ shall be put out of the king's protection, &c.”

Sec.

2 Bulst. 299.
3 Inst. 125.
C. Jac. 336.

Sect. 16. In the construction of these statutes it was holden, That certain commissioners of sewers for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*.

3 Inst. 123.
4 H. 4. c. 23.
2 Cha. Caf. 97.
D. 201, 301.
1 Lev. 241.
Hard. 125.
1 D. Abr. 764.
1 Sid. 463.
1 Mod. 59.
3 Keb. 221.

Sect. 17. Also there have been formerly many strong opinions, That suits in equity to relieve against judgment at law, are within these statutes; especially if the end thereof be to controvert the very point determined at law, or to seek relief after judgment in a case wherein the law may relieve, as against excessiveness of damages, &c. But it seems to be generally agreed at this day, That no such suit is within the intention of the said statutes.

2 Bulst. 299.
1 Roll. 190.
(c) 3 Inst. 120,
121, 122.
B. Præmun.
5. 12. 16. 31.
15 H. 7. 9.
22 Co. 37.
2 R. Abr. 177.
Moor 838.
C. Jac. 134.

Sect. 18. It hath been said, That suits in the admiralty or ecclesiastical courts within the realm are within 16 Rich. 2. c. 5. (by force of those words, *or elsewhere*;) if they concern matters, the cognizance whereof belongs to the common law; as where a bishop deprives an incumbent of a donative, or excommunicates a man for hunting in his parks, &c. or where (c) commissioners of sewers imprison a man for not releasing a judgment at law.

Sect. 19. But it seemeth, That a suit in those courts for a matter which appears not by the libel itself, but only by the defendant's plea, or other matter subsequent, to be of temporal cognizance, (as where a plaintiff libels for tithes, and the defendant pleads that they were severed from the nine parts, by which they became a lay-fee,) is not within the statute, because it appears not that either the plaintiff or the judge knew that they were severed.

Sect. 20. The third offence of this nature, *viz.* That of appealing to Rome from any of the king's courts, is made a *præmunire* by 24 Hen. 8. c. 12. and c. 20, 21. and 25 Hen. 8. c. 19. by which it is enacted "That all such appeals as formerly were made to Rome, shall from henceforth be made to the high court of chancery."

Sect. 21. The fourth offence of this nature, *viz.* That of exercising the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, is made a *præmunire* by 26 Hen. 8. c. 14. which sets forth at large for what towns such suffragans may be nominated by the king, and also how they may be nominated, consecrated, and commissioned.

Sect. 22. The fifth offence of this nature, *viz.* That of refusing to elect or consecrate the person nominated by the king to a bishoprick, is made a *præmunire* by 25 Hen. 8. c. 20. s. 7. by which it is enacted, "That if any dean and chapter refuse to elect the person named in the king's letter for a bishoprick, and to signify such election to the king within twenty days after the licence shall come to their hands, or if any archbishop or bishop after such election (or nomination

“ nomination by the king in default thereof signified unto
 “ them by the king,) shall refuse within twenty days to con-
 “ firm and consecrate the person so signified to them, they
 “ incur a *præmunire*.”

Stat. 23. The sixth offence of this nature, *viz.* That of maintaining the pope's power, is made a *præmunire* upon the first conviction, and high treason upon the second.

Stat. 24. The seventh offence of this nature, *viz.* That of bringing in *Agnus Dei*, is made a *præmunire* by 13 Eliz. c. 2. f. 7, 8. by which it is enacted. “ That if any one shall bring
 “ into the realm, &c. any *Agnus Dei*, *croffes*, pictures, beads,
 “ or such like superstitious things, pretended to be hallowed
 “ by the bishop of Rome, &c. and shall deliver or offer the
 “ same to any subject to be worn or used in any wise; or if
 “ any one shall receive the same to such intent, and not clear
 “ himself by discovering the offender, &c. he shall incur a
 “ *præmunire*.”

Cawley 52, 53.
 V de 3 Jac. c. 3.
 f. 25. as to the
 penalty of im-
 porting, popish
 books. Ante,
 Ch. 15. f. 15.

Stat. 25. And so shall a justice of peace in the same county, who having any offence in that act declared unto him, shall not declare it to a privy counsellor, within sixteen days.

Cawley 54.

Stat. 26. The eighth offence of this nature, *viz.* That of contributing to the maintenance of a popish seminary, is made a *præmunire* by 27 Eliz. c. 2. f. 6.

Stat. 27. The ninth offence of this nature, *viz.* That of refusing the oaths, is made a *præmunire* by several statutes, for by 1 Eliz. c. 1. f. 19 it is enacted, “ That all ecclesiasti-
 “ cal persons, and all ecclesiastical and temporal officers,
 “ and all persons having the king's fees or wages, and by
 “ 1. 26. That all persons taking orders, or any degree in any
 “ university within the realm, shall take the oath of supre-
 “ macy, under pain of losing their benefices and offices.”

N B The
 1 Eliz. c. 1.
 as far as con-
 cerns the oaths
 is repealed by
 1 W. & M.
 c. 2. f. 2.

And it is further enacted by 5 Eliz. c. 1. f. 5 “ That all
 “ the persons above mentioned who are required by the said
 “ statute of 1 Eliz. c. 1. to take the said oath, and all school-
 “ masters, publick and private, barristers, benchers, read-
 “ ers, ancients in any house of court, &c. attornies, sheriffs,
 “ and officers belonging to the common or any other law,
 “ or to the crown, or to any court whatsoever, shall take the
 “ said oath in open court, before they shall be admitted to
 “ any such vocation or office, &c. And if they belong not to
 “ any court, that then they shall take the same before such
 “ person as shall admit them to such vocation, &c. or be-
 “ fore commissioners appointed under the great seal, &c.”—

And it is farther enacted f. 6. “ That any bishop
 “ may tender the said oath to any spiritual person within his
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"diocese, as well in places exempt as others;" and by s. 7. "That commissioners may be appointed by the Lord Chancellor to tender the same to such persons as by their commission they shall be authorized to tender it unto."

And by s. 8. "That if any person, compellable by either of the said acts, or appointed by such commissioners to take the said oath, shall refuse to take it on a tender thereof, he shall incur a *præmunire*."

And by s. 9. "That such refusal shall be certified within forty days before the king in his court of King's Bench, by those who have authority to tender the said oath, under the penalty of one hundred pounds; and that the sheriff of the county wherein the said court shall sit, may impanel a jury, who shall inquire of such refusal, in such manner as if it had happened in the same county."

Raym. 212.
1 Ven. 171.
2 Keb. 825.

Sect. 28. In the construction of these statutes it hath been resolved: First, That the obligation to take the said oath continued after the death of queen Elizabeth, tho' the statutes say nothing of her successors; and the like resolution also has been made in relation to the oaths appointed by subsequent statutes.

Raym. 445.

Sect. 29. Secondly, That in a commission authorising persons to tender the said oath, a general description of the persons to whom it shall be tendered is sufficient, without naming them particularly by their names.

Dyer 234.

Sect. 30. Thirdly, That if the person who tendered the oath as bishop, was not a bishop at that time, the defendant may give it in evidence upon the general issue.

1 Bulst. 197,
198.
2 Bulst. 290.
1 Ven. 172,
173.

Sect. 31. Fourthly, That the said oath must in substance be taken in the very words expressed in the acts, and cannot be qualified with any reserve whatever: yet it hath been resolved, That to use the words, *In conscience*, instead of, *in my conscience*, or *fea* of Rome, instead of *see* of Rome, makes no material variance.

Raym. 445.

Sect. 32. Fifthly, That a certificate of a refusal of the said oath made to the judges of the said court of the King's Bench by name, and not to the king in his said court, is sufficient within the meaning of the statute.

Dyer. 234. 363.

Sect. 33. Sixthly, That an ecclesiastical person is well described in such a certificate by the addition of *legum doctor*, & *sacris ordinibus constitutus*, without adding *clericus*, &c.

Dyer 234.

Sect. 34. Seventhly, That such a certificate being entered of record, as brought into court such a day and year *per A. B. Cancellar*: of such a bishop, is good, without entering that it was so brought *per mandatum episcopi*.

Dyer 234.

Sect. 35. Eighthly, That the trial must be by a jury of the county, wherein the oaths were refused; for the statute only authorises an indictment by a jury of the county, wherein the court sits.

Ch. 19. OF PRÆMUNIRE.

Stat. 36. Ninthly, That any mis-recital of the very words of the oath, in an indictment for not taking it is erroneous. See the books above cited.

Stat. 37. By 3 Jac. 1. c. 4. s. 13, 14. "Any bishop, or two justices of peace, whereof one is to be of the quorum, might tender the oath of obedience therein prescribed, to any person above the age of eighteen years, being under the degree of nobility, and convicted or indicted of recusancy, or not having received the sacrament twice in the year past, and also to any suspected stranger who shall not purge himself upon oath; and shall certify the names of such as take the said oath to the next Quarter-Sessions, and commit those who refuse it till the next Assizes or Sessions, where the same shall be again tendered; and if the said persons, or any other persons whatsoever of the age of eighteen years, other than noblemen or noblewomen, shall there refuse to take it, they incur a *præmunire*, unless they be *femes covert*, who shall be committed till they take it." The 3 Jac. 1. c. 4. as far as concerns the oaths, is revealed by 1 W. & M. c. 3. s. 2.

Stat. 38. By s. 41. "The lords of the council in like manner may tender the said oath to any nobleman or woman, of the age of eighteen years, who refusing the same, incur a *præmunire*, *femes covert* excepted."

Stat. 39. By 7 Jac. 1. c. 6. s. 2. 26, 27. "All persons whatsoever, as well ecclesiastical as temporal, of what estate, dignit., pre eminence, sex, quality or degree soever, he or she shall be, above the age of eighteen years, being in that aforesaid mentioned and intended, shall take the said oath; and any privy counsellor or bishop, within his diocese, may require any baron or baroness, of the age of eighteen years, and any two justices of the peace, whereof one to be of the quorum, may require any other person of that age to take it — And if any person of or above the said age and degree shall be presented, &c. for not coming to church, &c. then three of the privy council, whereof the Lord Chancellor, &c. to be one, shall require such person to take the said oath. — And if any person whatsoever, of the said age and under the said degree, shall be presented, &c. for not coming to church, &c. or if the minister, &c. shall complain to any justice of peace, &c. and the justice shall find cause of suspicion, then any one justice of peace shall require such person to take the said oath, &c. And all such persons refusing a tender of the said oath, shall be bound over to the Assizes or Sessions, where, if they refuse again, they incur a *præmunire*." And 27. "All such refusers are disabled to execute any publick place of judicature, or bear any other office, (being no office of inheritance or ministerial function) or to practise the common of civil law, physick or surgery, or the art of an apothecary." V. 16 Geo. 2. c. 3. S. Cawley 246, &c.

12 Co. 130, 131.

Self. 40. In the construction of these statutes it hath been resolved, That the justices of peace, &c. may send their warrant to bring such persons before them, but that they cannot authorise the constable to break open the doors to take them.

Vide 1 Geo. 1.
c. 13.

6 Geo. 3. c. 53.

Self. 41. But by 1 William & Mary c. 8. the oaths of supremacy and obedience, prescribed by these acts, were abrogated; and the following oath and declaration substituted in their room.—“I A. B. do sincerely promise and swear, “That I will be faithful and bear true allegiance to his majesty king George.”—“I A. B. do swear, That I do from my heart abhor, detest and abjure, as impious and heretical, that damnable doctrine and position, that princes excommunicated or deprived by the pope, or any authority of the see of Rome may be deposed or murdered by their subjects, or any other whatsoever.” “And I do declare, that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority ecclesiastical or civil within this realm.”

Vide ch. 24.

Self. 42. And by f. 3, 4, 5. “All persons who are required to take, or authorised to tender the said abrogated oaths, or either of them, are in like manner required and authorised to take and tender the said oath and declaration, under the same penalties, &c.”

Vide ch. 24. f. 7.
1 Comm. 363.
4 Comm. 115.
116, 123.

Self. 43. By 7 Will. 3. c. 24. “Serjeants at law, counsellors, attorneys, solicitors, proctors, clerks or notaries, practising as such in any court whatsoever, without taking the said oaths and subscribing the said declaration, incur a *præmunire*.”

Self. 44. And now I am in the second place to consider those offences against the authority of king and parliament, which come under the notion of *præmunire*; as to which it is enacted by 6 Ann. c. 7. “That if any person shall maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain and affirm, that the pretended prince of Wales, hath any right or title to the crown of these realms, or that any other person or persons hath or have any right or title to the same, otherwise than according to 1 Will. & Mar. c. 2. and 12 Will. 3. c. 2. and the acts then lately made in England and Scotland, mutually for the union of the two kingdoms; or that the kings or queens of this realm, with the authority of parliament, are not able to make laws to limit the crown and the descent, &c. thereof, shall incur a *præmunire*.”

4 Comm. 217.
1 Bull. 299.
Co. Lit. 129.
3 Ind. 125, 218.
B. 2. p. 444.

Self. 45. As to the second general point of this chapter, viz. In what manner offences of this nature are punished. It is to be observed, That most of the statutes of *præmunire* refer the punishment to 16 Rich. 2. c. 5. which enacts, that those who

who offend against the purport thereof, shall be put out of the king's protection, and their lands and tenements, goods and chattels forfeited to our lord the king; and that they be attached by their bodies, if they may be found, and brought before the king and his council, there to answer to the cases aforesaid, or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

Stat. 46. Inasmuch as this statute expressly saith, that such offenders shall be put out of the king's protection, and also the statute of 25 Edw. 3. c. 5. had farther added, "That any one might do with a purchaser of the provisions therein prohibited; as with the king's enemy; and that he who should offend against such a one in body, lands, or goods, should be executed," it was formerly holden, That a person attainted in a *præmunire* might lawfully be slain by any one, as being the king's enemy, and out of the protection of the laws; but the latter opinions seem to have disapproved of this severity. However, it is expressly enacted by 5 Eliz. c. 1. s. 21, 22. "That it shall not be lawful to kill any person attainted in *præmunire*, saving such pains of death or other hurt or punishment, as heretofore might, without danger of law, be done upon any person that shall send or bring into the realm, or within the same shall execute, any process, &c. from the see of Rome."

Co. Lit. 130.
12 Co. 68.
3 Inst. 128.
B. Cor. 197.
Jenk. 199.

Stat. 47. But howsoever the law may stand in relation to such persons as are within the exception of this act, it is certain that no person whatsoever attainted of any *præmunire* can bring an action for any injury whatsoever; and that no one knowing him to be guilty can with safety give him aid, comfort or relief.

1 Inst. 130.
1 Eliz. 1. c. 39.
Post. 126.
Staunf. 44.
Plow. 97.
4 Com. m. 118.
3 Jac. 133.

Stat. 48. But it hath been resolved, That those general words in the statute 16 Rich. 2. c. 5. That all the lands and tenements shall be forfeited, extend not to land entailed, after the death of the offender.

1 Inst. 130.
3 Inst. 126.
2 Lev. 169.
B. 2. c. 49.
s. 28.
C. Car. 172.
Jones. 217.

Stat. 49. Also it hath been resolved, That a statute, by appointing that an offender shall incur the penalty and danger mentioned in the 16 Rich. 2. c. 5. does not confine the

1. Ven. 173.
For the judgment in *præmunire*, see h. 2. c. 48. s. 9. to 273.

THE following offences also have been made subject to the penalties of a *præmunire*.

1. To molest the possessors of abbey lands, granted by parliament to Henry the Eighth and Edward the Sixth, 1 & 2, Ph. & Ma. c. 8. s. 40.
2. To take more than the rate of 30l. for the loan of 100l. for a year, against the injunctions of 5 Ed. 6. c. 20. 13 Eliz. c. 8. Nov. 2. Hct. 25. Cro. Jac. 253.
3. To procure any action to be delayed, after notice, otherwise than by the regular process of the court. 21 Jac. 1. c. 3. s. 4.
4. To obstruct the process of making gunpowder, or to prevent the importation of the ingredients of which it is made, by virtue of a pretended authority from the crown. 16 Car. 1. c. 21. s. 1. Jac. 2. c. 8.
5. To seize the property of another under colour of purveyance, or to impose any carriage by way of pre-emption. 12 Car. 2. c. 24.

the prosecution for the offence to the particular process there, by given.

6. To assert that both or either house of parliament have legislative authority without the king. 13 Car. 2. c. 1.
7. To send any subject of this realm a prisoner beyond the sea in defiance of the *habeas corpus* act. 31 Car. 2. st. 2.
8. To conspire to avoid the seizure or forfeiture upon the importation of cattle as mentioned in the act. 20 Car. 2. c. 7.
9. To treat of any other matter, at the convention for the election of the sixteen peers of Scotland, save the business of the election. 6 Anne c. 23.
10. To project any scheme by public subscription to the prejudice of great numbers in their trade, and similarto the South-Sea project. 6 Geo. 1. ch. 18. see Str. 472. L. Ray. 1367.
11. To solemnize, assist, or be present at the forbidden marriage of such of the descendants of George the Second, as are prevented by the act, from marrying without the consent of the crown.
12. Geo. 3. c. 11.

CHAPTER THE TWENTIETH.

OF MISPRISION OF TREASON.

2 R. 3. 10.
S. P. C. 37.
B. Cor. 174.
Treat. 25. 11.
Skia. 636.
1 Hale 374.
708.
3 Inst. 36.
4 Comm. 119.
Hudson of the court of Star Chamber M S S. in Mus. Brit.

THE word misprision has not any certain signification, but is generally applied to all such high offences as are under the degree of capital, and nearly bordering thereupon; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please.

Offences of this kind are generally said to be twofold. First, Negative, which consist in the omission of something which ought to be done.—Secondly, Positive, which consist in some misdemeanor actually committed.

Secl. 2. The negative misprision more immediately against the king is commonly called misprision of treason, which is an offence consisting in the bare knowledge and concealment of high treason, (whether it be such by 25 Edw. 3. or subsequent statutes) without any degree of assent thereto; and this is declared to be a misprision only by 1 & 2 Mar. c. 10. But at law, any delay in discovering high treason, whatever excuse the party might have for it, was deemed an assent to it, and consequently high treason.

Secl. 3. And at this day, if the concealment of high treason be accompanied with any circumstances which shew an approbation thereof, it amounts to high treason; as if one, having notice before-hand that persons designed to meet in order to conspire against the government, go into their company and hear their treasonable consultation and conceal it; or if one, who has been once accidentally in such company

Hale 48. 371.
Sum. 127.
Bract. 118.
S. P. C. 37.
3 Inst. 36.

Sum. 127.
Kely 17. 21.
4 Comm. 120.

CH. 21. OF CONTEMPTS AGAINST THE KING'S &c.

pany and heard such discourse, meet the same company a second time, and hear such like discourse, and conceal it.

Sec. 4. Also whoever receives and comforts a traitor, knowing him to be such, whether by counterfeiting of coin, (a) or otherwise, is himself a principal traitor; for such a receipt of a felon makes the receiver an accessory to the felony, and whatever makes an accessory in felony, makes a principal in treason.

Sec. 5. Neither can a person, who has knowledge of a treason, secure himself by discovering that there will be a rising in general, without disclosing the very persons intending to rise; nor even by discovering of these to a private person, who is no magistrate.

Sec. 6. But it seems that one who is only told in general that there will be a rising, without knowing any of the persons or particulars of the design, is not bound to make any discovery at all.

Sec. 7. There is one positive misprision which is made misprision of treason, by 13 Eliz. c. 2. by which it is enacted, That those who forge foreign coin, not current here, their aiders, abettors and procurers are guilty of misprision of treason, &c.

CHAPTER THE TWENTY FIRST.

OF CONTEMPTS AGAINST THE KING'S COURTS.

O THER positive misprisions more immediately against the king seem reducible to the following heads.—First, Contempts against his palace or courts of justice. Secondly, Contempts against his prerogative. Thirdly, Contempts against his person or government. Fourthly, Contempts against his title.

Sec. 1. And first, Contempts against the king's palace, &c. have always been looked upon as very high misprisions, and by the ancient law before the conquest, Fighting in the king's palace was a capital offence; and by 33 Hen. 8. c. 12. s. 7. "Malicious striking in the king's palace, whereby any blood shall be shed, is punishable with the loss of hand, perpetual imprisonment, and fine at the king's pleasure."

Sec. 2. It seems questionable from the construction of this whole act, and the general tenor of the law-books, whether striking in a palace, wherein the king is not at the

3 H. 7. 10.

Sum. 127.

3 Inst. 258.

12 Co. 82. 83.

Con. Dy. 286.

Inf. B. 2. c. 23.

(a) Qu.

1 Hale 213.

237. 613.

Kely. 22.

Sum. 127.

S. P. C. 37.

Kely. 22.

1 Hale 376.

4 Com. 121.

3 Hen. 7. c. 14.

9 Ann. c. 16.

Steirn de juic

Goth. 1. 3. c. 3.

L. L. Alured

cap. 7 & 34.

3 Inst. 140.

Pop. 206.

See first part of

the act.

S. P. C. 38.

B. Pain 16.

time Dalt. c. 90.

6 Mod. 75. 76.
3 Inst. 140.
4 Com. 125.

time actually resident, (1.) be within the statute; and it is said that the instance which is given in the third Institute, of a person's hand being cut off for striking in the tower, is not warranted by the record.

(1) The 3 Jac. 2. The Earl of Devonshire struck Colonel Culpepper in the room next to the drawing room at Whitehall; an information was exhibited in the King's Bench for this misdemeanor; and, the Earl pleaded his privilege, and refused to plead. On argument, the objection was over-ruled, and the Earl fined 3000*l.* and imprisonment till paid. On error being brought, the house of Lords determined, 1. That it was a contempt of privilege. 2. That the fine was exorbitant and repugnant to Magna Charta. 3. That no peer ought to be imprisoned at any time for the non-payment of a fine to the king. 11 State Trials. 133.

L. L. Ina. c. 6.
L. L. Canuti.
c. 96.

L. L. Alfred c. 7.
2 Inst. 149.

3 Inst. 140.

S. P. C. 38.

Delt. c. 90.

41 Aff. 25.

22 E. 3. 18.

Dyer 188.

2 See B. 2. c. 48.

f. 110.

Dalif. 23.

2 R. Abn. 76.

Sum. 131.

1 Keb. 752.

12 Co. 71.

(a) Owen 120.

C. Eliz. 405.

Secl. 3. However it is certain, That by the common law which continues to this day, striking in Westminster Hall, where the king is only present, as represented by his judges, and by their administration distributing justice to his people, is more penal than any striking in another place in his actual presence; for the latter is not punished with the loss of hand, unless some blood be drawn, nor even then with the loss of lands or goods: but if a person draw his sword on any judge, in the presence of the court of king's bench, chancery, common pleas, or exchequer, or before the justices of assize, or oyer and terminer, whether he strike or not; or strike a juror; or any other person, with or without a weapon, he shall lose his hand and his goods, and the profits of his lands during life, and suffer perpetual imprisonment, (a) if the indictment lay the offence as done *coram domino rege*.

1 Lev. 106.

6 Mod. 172.

Noy 104.

C. Jac. 367.

22 E. 3. 13.

3 Inst. 141.

Con. Sum. 131.

Secl. 4. Neither can one who is guilty of such offence excuse the same by shewing that the person so struck by him gave the first assault.

Secl. 5. Also he who rescues a prisoner from any of the courts above mentioned, without striking a blow, shall forfeit his goods and the profits of his lands, and suffer imprisonment during life, but not lose his hand, because he did not strike.

C. Eliz. 405.

C. Car. 373.

W. Jon. 345.

Owen 120.

3 Inst. 142.

Moor 819.

Secl. 6. And he who makes an affray in the palace-yard near the said courts, but out of their view, shall be imprisoned during the king's pleasure, and severely fined, but not lose his hand.

Secl. 7. And not only those who are guilty of such an actual violence, but also those who disturb such courts by threatening or reproachful words to any judge sitting in them, are guilty of a high misdemeanor; and in the time of Edward the First, one William de Bruce, who upon hearing judgment given against him in the exchequer, said to the chief baron, "Roger, Roger, Thou hast had thy will of me, which of a long time thou hast sought, and I will remember it," was for these words imprisoned during the king's pleasure, and ordered to walk from the king's bench to the exchequer, bareheaded and ungirt, and to ask forgiveness, &c. And in the time of Charles the First, one Har-
rison,

riſon, for ruſhing into the court of common plea, and ſaying to juſtice Hutton ſitting there, "I do accuſe Mr. juſtice Hutton of high treaſon;" was fined five thouſand pounds, and imprifoned during the king's pleaſure, and ordered to go to all the courts of Weſtminſter Hall, with a paper on his head, ſhewing his offence, and to make his ſubmiſſion, &c. And theſe caſes are the more remarkable, becauſe in the firſt, the offender was of a very honourable family; and in the ſecond, a bachelor of dignity, and yet condemned to ſuch corporal puniſhment; the loweſt of which is in judgment of law higher than the greateſt fine whatever.

C. Car. 303.
504.
Hutt. 131.
Pop. 135.

ſect. 8. Alſo all who reflect on the juſtice or honour of thoſe high courts ſeem to be indictable and highly finable; as if one charge an exemption under the great ſeal to be contrary to the original.

Hob. 220.
Moor 563.
Pop. 135.

ſect. 9. Alſo he who gives another the lie in Weſtminſter Hall ſitting the courts, ſhall be bound to his good behaviour.

1 Lev. 197.
1 Keb. 528.

ſect. 10. And, he, who makes an affray in the preſence of any of the king's inferior courts of juſtice, is highly finable, but not puniſhable with loſs of hand, &c.

3 Inſt. 141.
12 Co. 71.

ſect. 11. And he who ſpeaks contemptuous and reproachful words to the judge of ſuch a court in execution of his office is immediately fineable by ſuch judge, (a) or, as ſome ſay, may be (b) indicted, &c. as if one give the lie to a judge of a court-leet in the face of the court, (c) or being (d) admoniſhed by him to pull off his hat, ſay, "I do not value what you can do," or tell him in the face of the court that he is (e) forſworn, or call him (f) fool, &c. or ſay, "If I cannot have juſtice here, I will have it elſewhere." (g)

(a) C. Eliz. 78.
2 R. Abr. 78.
(b) 1 Sid. 144.
con. 2. R.
Abr. 78.
(c) Owen 113.
Moor 470.
C. Eliz. 587.
(d) Raym. 68.
1 Keb. 451, 465.
(e) 2 R. Abr. 78.
(f) C. Eliz. 78.
Moor 447.
(g) 1 Sid. 144.
1 Keb. 508.

ſect. 12. And it was formerly holden that a man might be indicted for a ſlander of the juſtice of the nation, by reflecting on a ſentence given in any court eccleſiaſtical or temporal, whether directly, as where one ſaid that ſuch a ſentence given by the high commiſſion court, was againſt law; or obliquely, as where one ſaid that ſuch a ſentence was juſt, but that the teſtimonies on which it was founded were falſe, or the affidavits equivocating.

2 R. Abr. 78.
1 Roll. 245.

ſect. 13. But it ſeems the better opinion of this day, That a man cannot be indicted for any ſcandalous or contemptuous words ſpoken of or to ſuch officers, not being in the actual execution of their office; for ſuch an offence ſeems rather to proceed from ill breeding than a contempt of the government; and though it may be a cauſe to bind a man to his good behaviour, yet it does not ſeem to be of ſuch conſequence as to be a ſufficient ground for a publick proſecution, as for an offence againſt the common peace, &c.

Hob. 202.
Moor 319.

1 Ven. 10.

And

And agreeable hereto hath been resolved, That a man shall not be indicted for saying, "That whenever a burgess of such a town puts on his gown, Satan enters into him;" (i)—or, That "the mayor and aldermen of such a town are as great villains as any that rob on the highway;" (j)—or, That, "the justices of peace understand no more of the statutes of excise than this Jug, nor one of twenty of the parliament-men who made them," (l)—or, That, such a justice of peace is a fool, an ass, and a coxcomb, for making such a warrant, and understands no more law than a slickhill," (m)—or, That "he is not fit to be a justice of peace; for that he will do right or wrong, according as his affections lead him," (n)—or That "such an order is a numscul order, and that the justice deserves to be hanged who made it;" (o)—or That, "such a justice of peace is a forsworn wretch, and that he will fling his purse at him;" (p)—or for saying to a mayor of a town, "You Mr. Mayor, I do not care a fart for you; You Mr. Mayor, are a rogue and a rascal," (q)—or for saying, That, "The justices of peace have nothing to do with the excise." (r)

Sec. 14. And not only those who disturb the administration of justice by direct contempts offered to the king's courts, but also all such as are guilty of any injurious treatment of those persons who are under the more immediate protection of those courts are highly punishable by fine and imprisonment; as if a man assault or threaten his adversary for suing him, or a counsellor or attorney for being employed against him, or a juror for giving a verdict against him, or a gaoler for keeping a prisoner in safe custody.

Sec. 15. Also all who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable, as those who being examined before the privy council concerning their knowledge of a crime, whereof a third person is accused, disclose what passed in such examination, in order to suppress a farther discovery; and also all those who dissuade, or but endeavour to dissuade a witness from giving evidence against a person indicted, &c. or who advise a prisoner to stand mute on his arraignment, &c. And it was anciently holden, that if one of the grand inquest discover to any persons indicted, the evidence against them, he is an accessory to the offence, whether treason or felony; and at this day it is agreed, that he is guilty of a high misprision; punishable by fine and imprisonment.

(i) 1 Mod. 35.
2 Keb. 594.

(j) 5 Mod. 203

(l) 2 Keb. 494.
5 Mod. 204.
2 Ven. 16.

(m) Q. v.
Wrightson,
Salk. 698.

(n) Q. v. Soley;
Salk. 698.

(o) Q. v. Le-
galley.

(p) Q. v. Brox-
ham.

(q) 6 Mod. 124.
Salk. 697.

(r) 1 Ven. 10.

3 Inst. 142.
Sum. 131.
Jatch. 220.
Bari. 112.

2 R. Abr. 76.

Mob. 271.

Raym. 276.
Ti. per Pa. 164
Sum. 111.
2 R. Abr. 177.
S. P. C. 11. 30.
27 Aff. 63.
B. Cor. 113.
Sum. 131.
3 Inst. 22. 106.
3 Leon. 207.

CHAPTER THE TWENTY SECOND.

OF CONTEMPTS AGAINST THE KING'S PREROGATIVE.

CONTEMPTS against the King's prerogative are of so various a nature, that they cannot well be reduced to any certain heads. However, the principal of them seem to come under the following particulars: First, Refusing to assist the king for the good of the publick. Secondly, Preferring the interests of a foreign prince to that of our own. Thirdly, Disobeying the king's lawful commands or prohibitions.

Sect. 2. First therefore, it is a high offence for any subject to deny the king that assistance for the good of the publick, either in his councils or wars, which by the law he is bound to give him; as for a peer not to (a) come to the parliament at the day of summons, or to (b) depart from thence without the king's licence; or for a (c) privy councillor to refuse to give his advice on an affair of state; or for any (d) private subject to refuse to serve the king in person, if he be able, or to find another, if he be not able, in the defence of the realm, against rebels and foreign invaders; or, as some say, to refuse to serve the king for pay in his wars abroad.

(a) Moor 778. Nov 102.
(b) S. P. C. 38. F. Cor. 161.
(c) 2 R. Abr. 211.
(d) 2 R. Abr. 165. B. Tenure 44. 73.
1 Ed. 3. c. 5.
18 Ed. 3. c. 7.
25 Ed. 3. c. 9.
4 H. 4. c. 13.
11 H. 7. c. 1.
& 18.
C. Car. 11.
18. f. 12.

253. 257. Crom. Jur. 83. 84. 3 Inst. 144. Hob. 235. 12 Co. 94. Ante c.

Sect. 3. Secondly, It is so high an offence to prefer the interest of a foreign prince to that of our own, that it is criminal to do any thing which may but incline a man so to do; as to receive a pension from a foreign prince without the leave of our king.

Wide ante.
Ch. 18. f. 10.

Sect. 4. Thirdly, It is also a high crime to disobey the king's lawful commands or prohibitions; as by obstinately refusing obedience to his writs; or contemning a summons from his council to appear before them; or not answering such questions in relation to a matter wherein the interest of the state is concerned, as shall be proposed by the privy council; or refusing to give evidence to a grand jury concerning a crime (for which (e) the court may impose an immediate fine); or not returning from beyond sea upon the king's letters to that purpose; for which the offender's lands shall be seized till he return, (and when he does return he shall be fined) or assembling at a tournament against the king's express prohibition; or going beyond sea against the king's will ex-

(e) Salk. 278.
Dyer 176. 128.
Moor 109. 779.
Lape 43.
3 Inst. 179.
Sav. 7. 8.
2 R. Abr. 208.
F. N. B. 85.
1 Cha. Ca. 116.
3 Inst. 178.
4 Comm. 122.
1 Comm. 266.

pressly

pressly signified, either by writ, *ne exeat regnum*, (which may be directed as well to a layman as to a clergyman, and on the suggestion of a private as well as of a publick matter) or under the great or privy seal or signet, or by proclamation.

C. Eliz. 655.
B. 2. c. 26. 16.
2.

Sec. 5. Also every contempt of a statute is indictable, if no other punishment be limited.

TO the foregoing contempts against the king's prerogative may be added neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices according to the statute, 2 Hen. 5. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. 4 Comm. 124. Lamb. Eir. 315.

CHAPTER THE TWENTY THIRD.

OF CONTEMPTS AGAINST THE KING'S PERSON OR GOVERNMENT.

4 Comm. 123.

ALL contempts against the king's person or government are very highly criminal, and punishable with fine and imprisonment, and sometimes with the pillory, by the discretion of the judges, upon consideration of all the circumstances of the case. But inasmuch as it is generally obvious to common sense, in what cases and to what degree a man is guilty of this offence, and it would be endless to enumerate all the particulars, I shall content myself with glancing at some of the most general heads; as,

C. Car. 168.
2 Keb. 336.

Sec. 1. The charging the government with oppression or weak administration; as by saying, That "merchants are "screwed up here in England more than in Turkey;" or, That "it is a good world when beggarly priests are made "lords, &c."

3 Mod. 52.
3 Mod. 363.

Sec. 2. The doing an act which impliedly encourages rebellion; as by absolving persons at the gallows, who being condemned for high treason, shew no sign of repentance, but persist in justifying the fact; or by drinking to the pious memory of a person executed for high treason.

C. Jac. 37.
Moor 756.
Noy 101.

Sec. 3. Endeavouring to frighten the king into a change of his measures with threats of the uneasiness of his subjects; as by subscribing a petition to him, in which it is intimated, that if it be denied, many thousands will be discontented, &c.

C. Jac. 12.
Vide the case of
Alexander Scott
for publishing
false news. O. B.

Sec. 4. Spreading false rumours concerning the king's intentions; as that he designs to grant a toleration to papists, &c.

June Session, 1778. No. 504.

Noy 105.

Sec. 5. Charging him with a breach of his coronation oath;

Sec. 6.

Sect. 6. Speaking contemptuously of him; as by cursing him, &c. or giving out that he wants wisdom, valour or steadiness; or in general, doing any thing which may lessen him in the esteem of his subjects, and weaken his government, or raise jealousies between him and his people.

C. Car. 117, &c.

Sect. 7. Also it is said to be an offence, for which a man may be indicted, to refuse in a foreign port to pay the usual customs, because it may cause a breach between our king and the king of the country.

1 Sid. 143.
For other contempts against the King's Person and Government.
Vide Skin. 633.
1 Black. 37.

CHAPTER THE TWENTY FOURTH.

OF CONTEMPTS AGAINST THE KING'S TITLE.

CONTEMPTS against the king's title are of two kinds,—First, Denying his title.—Secondly, Refusing to take the oaths required by law for the support of his government.

Sect. 1. The first offence of this kind, viz. That of denying the king's title, hath by some been carried so high as to be adjudged an overt act of compassing his death. However, it is certainly most highly criminal, and punishable with fine and imprisonment, and also such infamous corporal punishment, as to the discretion of the court shall seem proper, according to the heinousness of the crime and the circumstances of the parties. As if a man in writing or discourse shall maintain that the king is an usurper; or that another hath a better title to the crown, &c. For such like insinuations manifestly tend to raise tumults and disorders in the state, and to alienate the affections of the people from the prince, and incline them to favour the pretensions of another; and it is highly presumptuous for private persons to intermeddle with matters of so high a nature; and it will be impossible to preserve the peace of a government, unless subjects will quietly submit themselves to those whom Providence had placed over them, and prefer the publick good to their own private inclinations and opinions. For otherwise, whenever the title to the crown shall happen to be contested, it will be impossible to end the difference without perpetual civil broils and dissensions, and the prince who prevails will be tempted to esteem those of the contrary party rather as enemies than subjects, if he finds them ready and desirous to lay hold of all opportunities to disturb his government, and shake off their forced obedience. And since there is no tribunal but

Yelv. 107. 19
2 Roll. 90.
Finn. 224.
4 Comm. 123.
124

but that of heaven; to which princes can appeal for the decision of their titles, when that seems so far to have declared in favour of us, as to give him quiet possession of the throne, the public peace, which is the end of all government, requires a dutiful submission to him; and it is the highest madness to give up that ease and security which we may enjoy from a peaceful obedience, in exchange for that disorder, uncertainty, and bloodshed, which cannot but be expected from an attempt to wrest the sceptre out of the hands of our prince; and it is the highest ingratitude to make no other return but disloyalty and rebellion, for all the happiness we can enjoy under a just administration; and it is the greatest of absurdities to think that the good of the community, for the sake of which all government was instituted, ought not to be preferred before the disputed title of a particular person or family. All we can desire from government, is the secure enjoyment of what we may call our own, and whether this or that competitor to the crown be the instrument of this happiness to us, seems little to concern us. Let the title of one out of possession of the throne be never so plausible, it must have its original foundation from some positive law; which, when it cannot take effect without involving a nation in discord and confusion, the avoiding whereof is the very end of all laws, it must give way to the public necessity of the state; for there can be no human institution whatsoever, but must be limited by this implicit reserve from the first principles of reason, that wherever the execution of it shall be absolutely inconsistent with the happiness of the people for whose sake it was ordained, it ought so far to be suspended.

4 Comm. 123.

Self. 2. For this and many other such like reasons, the law has always had a most tender regard for the security of the prince in possession of the crown, and as it has made it high treason to compass his death, &c. as appears from chapter 17. section 11, &c. so hath it also made it highly penal in any inferior degree to disturb or disquiet his government.

As to the second kind of offences of this nature, viz. That of refusing to take the oaths required by law for the support of the king's government; I shall consider,—First, The offence of refusing the oaths required for this purpose by the common law.—Secondly, The offence of refusing the oaths required by statute.

Finch 241,
242.

2 Inst. 73.
1 Hale 64. 71.
2 Keb. 314.

Self. 3. As to the first particular, it seems to be a high contempt at the common law to refuse to take the oath of allegiance to the king, which all laymen above the age of twelve years are bound to take at the torn or court-leet, &c. and surely nothing can be more unreasonable than to deny the

the king, whose government we are happy under, all proper assurances of our fidelity, to him; for how can we expect to enjoy the privileges of subjects from one to whom we refuse to acknowledge ourselves subjects, or hope for protection from one, whom we provoke to esteem us as his enemies, or blame that government for treating us as malecontents, to which we give so just a cause to suspect our fidelity? If we consult the law of God, that will tell us, That: "the powers that be are ordained of God." If we will hear the voice of reason, that will convince us, that not only the peace and safety of the community, but also our own preservation, requires us to pay a dutiful obedience to those who govern us; and can we think it unlawful to engage ourselves to do what it is our duty to do? If we will consult the practice of all nations, that will shew us, that even conquest, which is the weakest of all titles, has always been esteemed to give the conqueror such a right to the obedience of the conquered, that upon his taking them into his protection, they have in all ages been ready to promise a reciprocal obedience. And if we will consult our own laws, we shall find them to direct us to pay our allegiance to the king who governs us, as has been fully proved in the chapter of high treason.

1 Comm. 367
4 Comm. 270.
223.

As to the second kind of offences of this nature, viz. That of refusing the oaths required by statute for the support of the government, I shall consider,—First, The offence of refusing the oaths of allegiance and supremacy.—Secondly, The offence of refusing the oath of abjuration.

SECT. 4. As to the first of these offences, viz. That of refusing the oaths of allegiance and supremacy, which since the reformation of religion have been thought necessary to be required from all persons, especially from those who are intrusted with an office, in order to secure our princes from the intrigues of popes, who have often taken upon them to dispense with oaths of allegiance made to such princes whom they are pleased to call hereticks, and to persuade the people that they may lawfully depose those who have so far incurred the displeasure of the bishop of Rome, as to be excommunicated by him, it having been shewn already in chapter 8. under what penalties officers are bound to take the said oaths, and in chapter 19. sect. 27, &c. how far all persons whatsoever are compellable to take them under pain of incurring a *præmunire*, I shall only take notice in this place, of the method of proceeding on 1 Will. & Mar. c. 8. by which it is enacted, "That persons refusing the said oaths, being tendered to them by persons lawfully authorized to tender the same, shall be committed by the persons making such a tender for three months, unless they shall pay such sum, not exceeding 40 s. as the persons, who shall make such tender, shall require of them, and if they refuse again at the

1 Comm. 368.
2 Inst. 121.
1 Hale. 64.
4 Comm. 1:5.

“ the end of the three months, that they shall be imprisoned
 “ six months, or pay a sum not above ten or under five
 “ pounds, and, also find sureties for their good behaviour
 “ and appearance at the next assizes, where if they refuse the
 “ said oaths, they shall be incapable of any office, and con-
 “ tinue bound to their good behaviour, and if they refuse
 “ the declaration mentioned in 30 Car. 2. they shall suffer
 “ as popish recusants convicted.”

Sett. 5. It seems to be the intention of this statute, to give the government an election to proceed either on the mild method therein prescribed, or the more severe one appointed by the former laws, according to the circumstances of the case, and quality of the offender, &c.

1 Comm. 368.

Sett. 6. As to the second offence of this kind, viz. That of refusing the oath of abjuration, the same depends on those laws, which the nation has been of late under a necessity of establishing, by adding a new limitation to the law relating to the succession of the crown, excluding all Papists from a possibility of inheriting it; who, if they be true to their engagements to their own religion, cannot but be false to those they may make to ours, and can never be expected to execute those laws, which they cannot but think void, as being repugnant to the laws of God; or to defend that faith which they think damnable; or to observe those oaths, which seem to them to have been ordained for the support of irreligion. And from these considerations they have been disabled from inheriting the crown, it seeming of absolute necessity in our present circumstances for the good of the community, to make such an alteration in law, which like all other human laws depending merely on the policy of men, seems to have nothing in it so sacred as to oblige the people unalterably to abide by it to the hazard of their common safety, peace and happiness, for the sake whereof it was at first ordained. For surely, there cannot be so much danger to the common good from such an alteration, as must needs follow from the government of a prince, whose conscience is under the influence of those, who are implacable enemies to the religion of his country, and who thinks himself bound by his duty to God and his church to promote that interest, which his people think themselves under the like obligations to oppose. From which unhappy circumstances nothing can be expected but endless factions, discords, irreconcilable jealousies and dissensions between prince and people, which, if they break not into an open rupture, will at least be attended with such convulsions and uneasinesses, as render a state of government scarce one degree more secure than a state of anarchy and confusion.

Sec. 7. For the remedying of such like inconveniences, it having been thought proper to exclude all papists from the crown, it was likewise thought expedient to secure the present settlement, by obliging all officers, &c. to take the oath of abjuration. As to which it is enacted by 13 Will. 3. c. 6. & 1 Geo. 1. st. 2. c. 13. "That all persons who shall be admitted, &c. into any office civil or military, (not being an office of inheritance, executed by a lawful deputy) or shall receive any pay, salary, fee or wages, by reason of any patent or grant from the king, or that have a command or place of trust under the king, &c. or shall be admitted into any service or employment in the king's household or family, or of his royal highness George prince of Wales, or her royal highness the princess of Wales, or their issue, and all ecclesiastical persons, heads or governors, of what denomination soever, and all other members of colleges and halls in any university, that shall be of the foundation, or enjoy any exhibition, being of, or as soon as they shall attain the age of eighteen years, and all persons teaching or reading to pupils in any university or elsewhere, and all school-masters and ushers, and all preachers and teachers of separate congregations, high or chief constables, and every person who shall act as serjeant at law, counsellor at law, barrister, advocate, attorney, solicitor, proctor, clerk, or notary, by practising in any manner as such, in any court or courts whatsoever within that part of Great Britain called England, shall, within three months (a) after they shall be admitted into or enter upon any such preferment, benefice, office, or place, or come into such capacity, or take upon them such practice, employment, or business, take and subscribe the oaths of allegiance, supremacy and abjuration, (b) at one of the courts at Westminster, or at the general quarter-sessions of the peace where they shall reside; or otherwise they shall be *ipso facto* adjudged incapable, and disabled in law, to have, occupy, or enjoy the said offices, &c. and if they shall by themselves, or deputy or trustee, execute any the said offices, &c. and shall be thereof convicted, &c. they shall be disabled to prosecute any suit at law or equity, or to be guardians, executors, or administrators, or capable of any legacy or deed of gift, or to be in any office within this realm, or to vote at any election for members of parliament, and shall forfeit five hundred pounds, &c."

1 Comm. 363.

(a) By 2. Geo. 2. c. 31.

9 Geo. 2. c. 26.

16 Geo. 2. c. 30.

the time is en-

luded to six

months and o-

ther regulations

enact d.

(b) After the

death of the late

pretender who

assumed the ti-

tle of king of

England by the

name of James

the Third, it be-

came absurd to

renew a person

being dead,

therefore the

6 Geo. 3. c. 53.

has altered the form of the oath of abjuration so as to renounce the descendants of the said James. But no provision is made for altering in like manner the Quakers form of affirmation.

Sec. 8. And it is farther enacted by the said statute, "That any two justices of the peace, or any other person or persons who shall be by the king for that purpose specially appointed, by order in the privy council or by commission under the great seal, may administer and tender the said oaths to any person

Vide 12 Co. 131.

(a) It seems that a bare suspicion is not sufficient, but there must be some good cause of suspicion, and that the cause of suspicion is traversable.

3 Burn. 249.

(b) A person cannot be said to refuse the oaths unless they be read to him or offered to be read.

“ person whatsoever, whom they shall suspect (a) to be dangerous or disaffected; and that if any person, to whom the said oaths shall be so tendered, shall neglect or refuse (b) to take the same, or if any person, being summoned by the said justices, &c. in order to take the said oaths, either in proper person, or by notice left at his place of abode with one of the family, shall neglect or refuse to appear, &c. such refusal shall be certified at sessions, &c. and from thence to the king’s bench or chancery, &c. and every such person so neglecting to take the said oaths, shall be adjudged a popish recusant convict, &c.”

3 Burn. 249. But see 5 Mod. 316. Saik. 428. Jones 121.

Sec. 9. And it is farther enacted by the said statute, “ That if any member of either university shall neglect to take and subscribe the said oaths according to the intent of the said act, or to produce a certificate thereof, under the hand of some proper officer of the respective court, and cause the same to be entered in the register of the proper college or hall, within one month after his having taken and subscribed the said oaths; and if the persons in whom the right of election of such member shall be, do neglect to elect some fitting person in his stead within twelve months, &c. that then the king may, under the great seal or sign manual, nominate some fitting person, qualified according to the local statutes of such college, &c. and if the head of any college, &c. shall neglect to admit such nominee, by the space of ten days after such admission shall be demanded of him, that then the local visitor shall admit the said nominee; and if such visitor shall neglect or refuse to admit such person within the space of one month after the same shall be demanded, that then the court of king’s bench may issue a writ of mandamus to such visitor to admit such nominee, &c.”

Sec. 10. And it is farther enacted by the said statute. “ That no peer shall vote or make his proxy, or sit in the house of peers during any debate, and that no member of the house of commons shall vote or sit during any debate in the said house after the speaker is chosen, until he shall have taken the said oaths, &c. under pain of the disabilities and forfeitures above mentioned, &c.”

SOME PART similar to the oaths required by the corporation and test acts, and the acts above mentioned, are the ceremonies and oaths required previous to being naturalized. 4 Comm. 58. for which, see 1 Jac. 1. c. 2. 7 Ann. c. 5. 10 Ann. c. 5. 4 Geo. 2. c. 21. 20 Geo. 2. c. 44. For the declaration against popery, vide 30 Car. 2. st. 2. c. 1.—For the oaths to be taken by peers of Scotland, and by privy counsellors, vide 6 Ann. c. 23. 1 Geo. 1. c. 4.—For the Moravian affirmation, 22 Geo. 2. c. 30. Quakers profession of belief, 1 Will. 3. c. 18. Quakers affirmation, 8 Geo. 1. c. 6. and for the cases in which it is allowed to be taken, 5 Mod. 403. Str. 441, 527, 856, 872, 1219.

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CHAPTER THE TWENTY-FIFTH.

OF FELONY.

OFFENCES more immediately against the subject are either capital or not capital.—The capital are either by the common law, or by statute.

Seet. 1. Those by the common law come generally under the title of felony, which, *ex vi termini*, signifies, *quodlibet eripien felleo animo perpetratum*, and can be expressed by no periphrasis, or word equivalent, without the word *felonice*. Vide Spelm.
Gloss. verb.
Feloniam 214.
Co. Lit. 391.

Seet. 2. Felony is said to be included in high treason, and consequently a pardon of felony discharges an indictment of high treason, if it want the word *proditorie*. Sum. 11. 3 H.
7, 10. 3 Inst.
15. 4 Comm.
94. 97.

Seet. 3. It is always accompanied with an evil intention, and therefore shall not be imputed to a mere mistake or misanimadversion, as where persons break open a door, in order to execute a warrant, which will not justify such a proceeding; *affectio enim tua nomen imponit operi tuo; item crimen non contrahitur nisi nocendi voluntas intercedat*. But the bare intention to commit a felony is so very criminal, that at the common law it was punishable as felony, where it missed its effect through some accident no way lessening the guilt of the offender. But it seems agreed at this day, That felony shall not be imputed to a bare intention to commit it, yet it is certain that the party may be very severely fined for such an intention. Bract. 1. c. 4.
S. P. C. 17. 27.
1 Lev. 146.
1 Sid. 230, 231.
Kely. 24. Sum.
61.
5 Mod. 206.

FELONY in the general acceptance of our English law, comprizes every species of crime which occasioned at common law the forfeiture of land or goods. This most frequently happens in those crimes for which a capital punishment either is, or was liable to be inflicted. All offences therefore now capital are in some degree or other felony: and this is likewise the case with some other offences which are not punished with death; as larceny, where the party is already dead; homicide, by chance medley or in self-defence; and petit larceny, or pilfering; all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. The definition of felony, therefore, seems to be, "an offence which occasions a total forfeiture of either lands or goods, or both at the common law; and to which capital or other punishment may be superadded according to the degree of guilt." But felony may be without incurring capital punishment, as in the case instanced of self murder, excusable homicide and petit larceny; and it is possible that capital punishments may be inflicted, and yet the offence be no felony; as in the case of heresy by the common law, which, though capital, never worked any forfeiture of lands or goods; (3 Inst. 43.) an inseparable incident to felony. And of the same nature is the punishment of standing mute, without pleading to an indictment; which is capital but without any forfeiture, and therefore such standing mute is no felony. In short the true criterion of felony is forfeiture. The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. Therefore if a statute makes any new offence felony, the law implies that it shall be punished with death, as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute. 4 Comm. 94 to 99.

CHAPTER THE TWENTY-SIXTH.

OF CASUAL DEATH AND OF DEODANDS.

OF capital offences at common law more immediately against the subject, there are three principal kinds: First, Such as are committed against his life. Secondly, Such as are against his goods. Thirdly, Such as are against his habitation.

Book 2d. c. 17. Sect. 1. There is another mix'd kind of capital offences, which consists in the hindrance of the due process of public justice, which I shall consider in the second book, wherein I shall treat of the means of bringing offenders to their due punishment.

Bra3. l. 3. c. 4. Sect. 2. Offences against the life of a man come under the general name of homicide, which in our law signifies the killing of a man by a man.

1 Hale 471, 472. Sect. 3. But before I treat hereof, it may not be improper to consider the killing of a man merely *per infortunium*, occasioned by some animal or thing without life, without the default or procurement of another man, as where one is killed by a fall from a horse or cart, &c. which, though it be not properly homicide, nor punishable as a crime, yet is taken notice of by the law, as far as the nature of the thing will bear, in order to raise the greater abhorrence of murder, and the unhappy instrument or occasion of such death is called a deodand, and forfeited to the king, in order to be disposed of in pious uses by the king's almoner; as also are all such weapons whereby one man kills another.

Put. 155.
5 Co. 124.
3 Inst. 57.
Comm. 300.
1 Hale 472.

S. P. C. 61.
3 Inst. 58.
Sum. 30.
Pol. 126.
Dalt. c. 97.
2 Keble 716.
Sect.

Sect. 4. It seems clearly settled, that a horse, &c. killing an infant within the age of discretion, are as much forfeited as if he were of age: But formerly it was holden, That a horse or cart, *by a fall from* which an infant was slain, were not forfeited, perhaps for this reason (1), because the misfortune might rather seem owing to the indiscretion of the infant than any default in the horse, &c. But this distinction has not been allowed of late; for the law does not ground the forfeiture on any default in the things forfeited, since it extends it to things without life, to which 'tis plain, that no manner of fault can be imputed.

(1) The forfeiture of deodands originated in the blind days of popery and superstition. They were designed to purchase, by propitiatory masses, an expiation for the souls of such as were snatched away by untimely death. But the presumed innocence of childhood rendered such atonement unnecessary. Therefore no deodand is due, where an infant under the age of discretion is killed by a fall from any thing that is not in motion, 1 Comm. 300. But if the instrument move to the death, either of an infant, or an adult, it is forfeited, or an inquisition found as a deodand. 3 Inst. 57. 1 Hale 472.

Sec. 5. Also by the opinion of our ancient authors, things fixed to a freehold, as the wheel of a mill, a bell hanging in a steeple, &c. may be deodands, but by the latter resolutions they cannot, unless they were severed before the accident happened.

S. P. C. 20.
Pult. 124.
1 Sid. 206, 207.
1 Lev. 136.
Raym. 97.
6 Mod. 187.
1 Keb. 723.
745. Str. 61. Co. Lit. 53. 283.

Sec. 6. However, as it is agreed by all, a ship in salt water, whether in the open sea or within the body of a county, from which a man falls and is drowned, is not forfeited, because persons at sea are continually exposed to so many perils, that the law imputes such misfortunes happening there, rather to them than to the ship. Also it seems clear, that when a man riding on a horse over a river is drowned through the violence of the stream, the horse is not forfeited, because not that, but the waters caused his death (2): But it is said, that a ship by a fall from which a man is drowned in the fresh water shall be forfeited, but not the merchandize therein, because they no way contribute to his death. And by the same reason it seems, that if a man riding on the shafts of a waggon fall to the ground and break his neck, the horses and waggon only are forfeited, and not the loading, because it no way contributed to his death; for which cause, where a thing not in motion causes a man's death, that part thereof only which is the immediate cause is forfeited. As where one climbing upon the wheel of a cart while it stands still, falls from it and dies of the fall, the wheel only is forfeited: but if he had been killed by a bruise from one of the wheels being in motion, the loading also would have been forfeited, because the weight thereof made the hurt the greater; and it is a general rule, that wherever the thing which is the occasion of a man's death is in motion at the time, not only that part thereof which immediately wounds him, but all things which move together with it, and help to make the wound more dangerous, are forfeited also; for the rule is, *Omnia quæque movent ad mortem, sunt deodanda*.

S. P. C. 20, 21.
Pult. 124, 125.
3 Inst. 53.
Summary 33.
1 Hale 422.
Salk. 22c.
C. Jac. 483.
2 Roll. 23.
Popham 136.

(2) Quere if it had appeared, that the horse had thrown him.

Sayer 249.
F. Cor. 341.

Bracl. l. 3. c. 5.

Sec. 7. In all these cases, if the party wounded die not of his wound within a year and a day after he received it, there shall be nothing forfeited, for the law does not look on such a wound as the cause of a man's death, after which he lives so long: But if the party die within that time, the forfeiture shall have relation to the wound given, and cannot be saved by any alienation or other act whatsoever in the mean time.

Sum. 55.
S. P. C. 21.

Dalt. c. 97.
Plowd. 26c.
Keilw. 68.

Sec. 8. However, nothing can be forfeited as a deodand, nor seized as such, till it be found by the coroner's inquest to have caused a man's death; but after such inquisition, the sheriff is answerable for the value of it, and may levy the same

5 Co. 110.
Co. Lit. 115.
Dalt. c. 97.
S. P. C. 21.
Pult. 125.
See 4 Ed. 1.
Hale 418, 419.

de Offic. Coronatoris.
on

on the town where it fell, and therefore the inquest ought to find the value of it. (3)

(3) Upon inquisitions of this kind the jury generally find the value of the dead and to be as small as possible, and even confine that value, according to the circumstances of the case, to the very thing or part of the thing itself which caused the death, 2 Bac. Abr. 26. This practice the court of king's bench have impliedly sanctioned, by refusing to reform it on an application in favour of the crown or its grantee, 10f. 206. 2 Bar. K. B. 82. Nor can such an inquisition be taken by the grand jury on default of the coroner. 1 Burr. 19 (and when taken by the coroner, it may be moved and traversed, 1 Burr. 20. 2 Hale 416.) because it is transacted in secret, taken *ex parte*, and intended as the platform of an odious and calumnious claim, 4 Inst. 196. repugnant to the principles of sound reason and true policy. Foster 266.

CHAPTER THE TWENTY-SEVENTH.

OF FELO DE SE.

HOMICIDE properly so called, is either against a man's own life, or that of another.—In treating of homicide against a man's own life, I shall consider: First, in what cases a man shall be said to be a *felo de se*. Secondly, what he shall forfeit for this offence.

1 Hale 417.
Crom. 20, 31.
Sum. 28.
Dalt. c. 92.
3 Inst. 54.

Sec. 1. As to the first point, I shall take it for granted, That in this as well as in all other felonies, the offender ought to be of the age of discretion, and *compos mentis*; and therefore, that an infant killing himself under the age of discretion, or a lunatick during his lunacy, cannot be a *felo de se*.

3 Mod. 100.

Sec. 2. But here I cannot but take notice of a strange notion, which has unaccountably prevailed of late, That every one who kills himself, must be *non compos* of course; for it is said to be impossible, that a man in his senses should do a thing so contrary to nature and all sense and reason.

Flow. 267.
Comb. 2, 3.

Sec. 3. If this argument be good, self-murder can be no crime, for a madman can be guilty of none: But it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position, that none but a madman can be guilty of it. May it not with as much reason be argued, that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it? But has a man therefore no use of his reason, because he acts against right reason? Why may not the passions of grief and discontent tempt a man knowingly to act against the principles of nature and reason in this case, as those of love, hatred and revenge, and such like, are too well known to do in others?

Sec. 4. However our laws have always had such an abhorrence of this crime, that not only he who kills himself with

a deliberate and direct purpose of so doing, but also in some cases he who maliciously attempts to kill another, and in pursuance of such attempt unwillingly kills himself, shall be adjudged in the eye of the law a *felo de se*. For wherever death is caused by an act done with a murderous intent, it makes the offender a murderer; and therefore if A. discharge a gun at B. with an intent to kill him, and the gun breaks and kills A. or if A. strike B. to the ground, and then hastily falling upon him wound himself with a knife which B. happens to have in his hand and die, in both these cases A. is *felo de se*, for he is the only agent.

Dalt. c. 144.
44 Aff. 55.
B. Cor. 12, 14.
3 Inst. p. 54.

Sec. 5. But if B. being so assaulted had been driven to the wall, and holden up a pitch-fork or knife, standing in his defence, and A. had hastily run upon the same and been slain, B. should be adjudged to kill him in his own defence. And for the same reason perhaps in the case above, if B. after he had fallen to the ground, had holden up a knife or sword in his defence, and A. had fallen thereon and been slain, B. should be adjudged to kill him *se defendendo*; for here B. exerts his strength in his own defence, and by so doing occasions the mortal wound received by A.

Staun. 16.
Sum. 28, 29.
Pult. 119.
Crom. 28.
3 Inst. 54.
Vide 1 Hale 413.
& 493. upon this case; which he contends is misrepresented both by Dalton and Coke, and that it was adjudged homicide per infortunium.

Sec. 6. He who kills another upon his desire or command, is in the judgment of the law as much a murderer, as if he had done it merely of his own head, and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, as being against the laws of God and man; But where two persons agree to die together, and one of them at the persuasion of the other buys ratibane, and mixes it in a potion, and both drink of it, and he who bought and made the potion, survives by using proper remedies, and the other dies, perhaps it is the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner.

Keilw. 136.

Moar 754.

Sec. 7. As to the second point, viz. What such an offender shall forfeit, it seems clear that he shall forfeit all chattels, real or personal, which he hath in his own right, and also all such chattels real whereof he is possessed either jointly with his wife, or in her right; and also all bonds and other personal things in action belonging solely to himself; and also all personal things in action, and as some say, entire chattels in possession, to which he was entitled jointly with another, on any account except that of merchandize; but it is said, that he shall forfeit a moiety only of such joint chattels as may be severed, and nothing at all of what he was possessed of as executor or administrator.

S. P. C. 188.
180. 262, 263.
1 Hale 413.
Finch. 216.
Sum. 29.
Crom. 31.
3 Inst. 55.
19 H. 6. 47.
S. E. 4, 24.
Raym. 7.
Plow. 243, 259.
262, 323.
4. Comm. 199.
193.

Sec. 8. However the blood of a *felo de se* is not corrupted, nor his lands of inheritance forfeited, nor his wife barred of her dower.

1 Hale 413.
Plow. 264, 265.

Sec. 9. Also no part of the personal estate is vested in the king, before the self murder is found by some inquisition; and consequently the forfeiture thereof is saved by a pardon of the offence before such finding.

5 Co. 110.
3 Inst. 54.
1 Summ. 362.
1 Hale 414.
1 Sid. 150, 162.
2 Mod. 53.
3 Mod. 106. 241, 242. Con. 1. Lev. 8. 1 Keb. 67, 68. 4 Comm. 190.

Sec. 10. But if there be no such pardon, the whole is forfeited immediately after such inquisition, from the time such mortal wound was given, and all intermediate alienations are avoided.

Sec. 11. And such inquisitions ought to be by the coroner *super visum corporis*, if the body can be found; and an inquisition so taken, as some say, cannot be traversed.

Sum. 29.
3 Inst. 55.
47 Ed. 3. 76.
See B. 2. c. 6.
1. 52. 1 Hale
414 to 417. For. 16. Salk. 190, 377. Carth. 72. Skin. 45. Stamf. 183. 3 Mod. 80, 238.
1 M. d. 82. 2 Keb. 859. 1 Vent. 181, 182. 2 Vent. 38. 2 Jones 198. 2 Hale 59. Lev. 8. Sid. 150.

Sec. 12. But if the body cannot be found, so that the coroner, who has authority only *super visum corporis*, cannot proceed, the inquiry may be by justices of peace, who by their commission have a general power to inquire of all felonies; or in the king's bench, if the felony were committed in the county where the said court sits; and such inquisitions are traversable by the executor, &c.

Sec. 13. Also all inquisitions of this offence being in the nature of indictments, ought particularly and certainly to set forth the circumstances of the fact; as the particular manner of the wound, and that it was mortal, &c. and in the conclusion add, that the party in such manner murdered himself.

Sec. 14. Therefore if either the premises be insufficient, as if it be found that the party flung himself into the water, *& sic jussum emergit*, which is nonsense, because *emerge* signifies only to rise out of the water: or if there be wanting the proper conclusion, *& sic jussum mandavit*, the inquisition is not good.

Sec. 15. Yet if it be full in substance, the coroner may be served with a rule to amend a defect in form.

1 Sid. 225, 229.
3 Mod. 101.
1 Keb. 507.
Fitzg. 6. See 1 Saund. 273. for process from the Crown-Office on such an inquisition against a debtor of a félo de se.

CHAPTER THE TWENTY-EIGHTH.

OF JUSTIFIABLE HOMICIDE.

HOMICIDE against the life of another either amounts to felony, or does not. That which amounts not to felony is either justifiable, and causes no forfeiture at all, or excusable, and causes the forfeiture of the party's goods.

And first of justifiable homicide; concerning which I shall premise these general rules.

Sec. 1. First, It must be owing to some unavoidable necessity, to which the person who kills another must be reduced without any manner of fault in himself. Vid. *sec.* 22.

Sec. 2. Secondly, There must be no malice coloured under pretence of necessity; for wherever a person who kills another, acts in truth upon malice, and takes occasion, from the appearance of necessity, to execute his own private revenge, he is guilty of murder. 2 Roll. 120.
Keily. 28.
Sum. 38.
Bract. l. 3. c. 4.
21 Edw. 1. de
Mal. in Parcia.

Sec. 3. Thirdly, According to the opinion of the old books (a), which in this respect seem to be contradicted by others more modern (b), it seems, that one may set forth a fact, amounting to justifiable homicide, in a special plea to an indictment or appeal of murder; and that the same being found true, he shall be dismissed, without being arraigned, or enforced to plead Not guilty. And indeed it seems extremely hard, that a sheriff or judge who condemn or execute a criminal, &c. should be forced, on a frivolous prosecution, to hold up their hands at the bar for it, &c. But it is agreed, that no one can plead a fact amounting to homicide *se defendendo*, or by misadventure, but that in such a case the defendant must plead Not guilty, and give the special matter in evidence: And it is also agreed, that where a special fact, amounting to justifiable homicide, is found by the jury, the party is to be dismissed, without being obliged to purchase any pardon, &c. (a) 22 Aff. 55.
27 Aff. 41.
37 H. 6. 20, 21.
Dalt. 150.
B. App. 5, 129.
B. Cor. 57, 87,
89.
(b) 35 H. 6.
11. 38.
B. App. 122.
2 Inst. 316.
Co. Lit. 283.
Sum. 38.
1 Hale 478.

Justifiable homicide is either of a public or private nature. That of a public nature, is such as is occasioned by the due execution or advancement of public justice.—That of a private nature is such as happens in the just defence of a man's person, house, or goods.

And first, I shall consider justifiable homicide in the due execution of public justice. As to which the following rules must be observed.

Sec. 4. First, The judgment, by virtue whereof any person is put to death, must be given by one who has jurisdiction in the cause; for otherwise both judge and officer may be guilty of felony. Dalt. c. 9.
1 Hale 497.
10 Co. 76.
22 E. 4. 33.
Sum. 35.

Sec. 5. And therefore, if the court of common pleas give judgment on an appeal of death, or justices of peace on an indictment of treason, and award execution, which is executed, both the judges who give, and the officers who execute the sentence, are guilty of felony, because these courts having no more jurisdiction over these crimes than mere private persons, their proceedings thereon are merely void, and without any foundation. 4 Comm. 178.
1 Hale 497. 500.
3 Inst. 48.
5 Rep. 105.
Cro. Car. 68.
Moor. 333.

Sec. 6.

Sum. 35.
Dalt. c. 98.
1 Hale 521.

Sec. 6. But if the justices of peace, on an indictment of trespass, arraign a man of felony, and condemn him, and he be executed, the justices only are guilty of felony, and not the officers who execute their sentence; for the justices had a jurisdiction over the offence, and their proceedings were irregular and erroneous only, but not void.

Co. Lit. 128.
2 Alf. 5.
S. P. C. 13, 196.
1 Hale 497.
11 H. 4. 12.
Plow. 366.
3 Inst. 131.

Sec. 7. Secondly, The judgment must be executed by the lawful officer.

Sec. 8. Indeed it was formerly holden, that any one might as lawfully kill a person attainted of treason or felony, as a wolf or other wild beast; and anciently a person condemned in an appeal of death, was delivered to the relations of the deceased, in order to be executed by them.

2 Alf. 41.
1 Hale 501.
B. App. 69.
Cor. 67, 117.
Co. Lit. 128.
Dalt. c. 98.
Sum. 35.

Sec. 9. But at this day, as it seems agreed, if the judge, who gives the sentence of death, and, *a fortiori*, if any private person execute the same, or if the proper officer himself do it without a lawful command, they are guilty of felony.

35 H. 6. 58.
1 Hale 454, 511.
B. App. 5.
S. P. C. 13.
Sum. 36, 272.
See B. 2. c. 51.
Finch. 31. 3 Inst. 52, 211. 2 Hale 411. 4 St. Tr. 129. Foster 268.

Sec. 10. Thirdly, The execution must be pursuant of, and warranted by the judgment, otherwise it is without authority; and consequently if a sheriff behead a man where it is no part of the sentence to cut off the head, he is guilty of felony (1).

(1) That is, if the officer varieth from the judgment, of his own head and without warrant or the colour of authority, but not if he is authorised by custom or by warrant from the crown. For although the latter count by his negative vary the execution in as to aggravate the punishment beyond the intention of the law; yet it doth not follow that he, who may commit part of the judgment or warrant, if the officer cannot mitigate his punishment with regard to the part or instance of it. Foster 267.

And now we are come to justifiable homicide in the due advancement of public justice, which I shall consider,—First, in relation to criminal,—Secondly, in relation to civil causes.

22 Alf. 54.
B. Cor. 77, 80.
S. P. C. 13.
3 Inst. 271.
Dalt. c. 98.
Sum. 36.
Crom. 39.
F. Cor. 162.
258, 261.
1 Hale 489.
Foster 271.
Furor, si ultio, æquum posset, occidere permittunt. S. comb. de jure Gorb.

Sec. 11. And First, Homicide in the advancement of public justice in criminal causes may be justified in several cases; as, first, if a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them.

See authorities above cited.
F. Cor. 179.

Sec. 12. Secondly, If an innocent person be indicted of a felony, where, in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may lawfully be killed by him, if he cannot otherwise be taken; for there is a charge against him upon record, to which at his peril he is bound to answer.

Sec. 13.

Sec. 13. Thirdly, If a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray. 1 Hale 481, 494. 495, 496.

Sec. 14. Fourthly, If those who are engaged in a riot, or a forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of peace, &c. or resist such justice endeavouring to arrest them, the killing of them may be justified; and so perhaps may the killing of dangerous rioters by any private persons, who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the purposes aforesaid. Crom. 30. 158. 1 Sum. 37. Staund. 13. 2 Inst. 52. Popn. 121.

Therefore a stranger who interposes to part the combatants in an affray, giving notice to them of that intention, and they assault him; if in the struggle he should chance to kill, this would be justifiable homicide; for it is every man's duty to interpose for the preservation of the public peace, and for the prevention of mischief. Foster 272. Vide also the Riot Act, 1 Geo. 1. c. 5.

Sec. 15. Fifthly, If trespassers in a forest, chace, park, or warren, or any inclosed ground wherein deer are kept, will not render themselves to the keepers upon an hue and cry made to stand to the king's peace, but fly from, or defend themselves against them, they may be slain by force of the statute *de malefactoribus in parcis*, 21 Ed. 1. fl. 2. and 3 and 4 Will. & Mary, c. 10. J. P. G. 13. Crom. 30. Dyer 326. 1 Hale 497. 9 St. Tr. 315.

Sec. 16. Sixthly, If either of the parties fighting in a combat allowed by law, for the trial of some special cases, be slain, he who kills him is justified, and the death of the other is imputed to the just judgment of God, who is presumed to give the victory to him who fights in maintenance of the truth. Dalt. c. 98. Flow. 9. 3 Inst. 221. 37 H. 6. 21.

BUT in all these cases there must be an apparent necessity on the officer's side, that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoner could not be kept in hold, the deer stealers could not but escape, unless such homicide were committed: otherwise without such absolute necessity it is not justifiable, 4 Comm. 180.

Sec. 17. Secondly, Homicide in the advancement of justice in civil causes, may also be justified in some cases.—As where a sheriff, &c. attempting to make a lawful arrest in a civil action, or to retake one who has been arrested and made his escape, is resisted by the party, and unavoidably kills him in the affray. 1 Roll. 189. Foster 270. Sum. 37. 3 Inst. 56. Crom. 24. Dalt. c. 98. 1 Hale 494. 4 Comm. 150.

Sec. 18. And in such case the officer is not bound to give back, but may stand his ground and attack the party. Sum. 37. Foster 292. Strange 499. 6 St. Tr. 195.

Sec. 19. But no private person of his own authority can arrest a man for a civil matter, as he may for felony, &c. Crom. 30.

Sum. 57.
1 Hale 481.
Fost. 161.
Foster 271.

SECT. 20. Neither can the sheriff himself lawfully kill those who barely fly from the execution of any civil process.

Puff. L. of N
455.

AND now I am to consider justifiable homicide of a private nature, in the just defence of a man's person, house, or goods. In treating whereof I shall shew, First, in what cases the killing of a wrong-doer may be justified by reason of such defence. Secondly, where the killing of an innocent person may be so justified.

24 H. 8. c. 5.
Dalt. c. 98.
1 Hale 486.
487, 493, 494
Sum. 32.
S. P. C. 14.
R. Cor. 100.
102.
F. Cor. 170.
102, 104, 201.
305.
C. Cui. 544.
26 Ad. 23.
Comm. 17.
Kely. 128, 12.
Fost. 271, 275.
9 Ann. c. 19.
(a) Vide text.

SECT. 21. And first the killing of a wrong-doer, in the making of such defence, may be justified in many cases: As where a man kills one who assaults him in the highway to rob or murder him; or the owner of a house, or any of his servants, or lodgers, &c. kill one who attempts to burn it, or to commit in it murder, robbery, or other felony (a); or a woman kills one who attempts to ravish her; (1) or a servant coming suddenly and finding his master robbed and slain, falls upon the murderer immediately and kills him; for he does it in the height of his surprize, and under just apprehensions of the like attempt upon himself:—But in other circumstances he could not have justified the killing of such an one, but ought to have apprehended him, &c.

(1) The injury intended can never be repaired or forgotten; and nature to render the sex amiable hath implanted in the female heart a quick sense of honour, the pride of virtue which kindleth and inflameth at every such instance of brutal lust. Fost. 274. Bac. El. 34. Prin. P. L. 211.—So too, the feelings of a parent or a husband which involuntarily actuate them at the moment to kill the forcible ravisher of a wife or a daughter's virtue, are justifiable. 1 Hale 488. And no doubt the forcibly attempting a crime of still more detestable nature may be equally resisted by the death of the unnatural aggressor. 4 Comm. 121.

Crom. 11.
Sum.
1 Hale 4.
443, 441.

SECT. 22. Neither shall a man in any case justify the killing another by a pretence of necessity, unless he were himself wholly without fault in bringing that necessity upon himself; for if a man, in defence of an injury done by himself, kill any person whatsoever, he is guilty of manslaughter at least; as where divers rioters wrongfully detain a house by force, and kill those who attack it from without, and endeavour to burn it.

Sum. 40, 57.
C. Car. 538.
Dalt. c. 68.
1 Hale 485.
486, 483.
Foster 273.

SECT. 23. Neither can a man justify the killing another in defence of his house or goods, or even of his person, from a bare private trespass; and therefore he that kills another, who claiming a title to his house, attempts to enter it by force, and shoots at it, or that breaks open his windows in order to arrest him, or that persists in breaking his hedges after he is forbidden, is guilty of manslaughter; and he who in his own defence kills another that assaults him in his house in the day-time, and plainly appears to intend to beat him only, is guilty of homicide *se defendendo*, for which he forfeits

feits his goods, but is pardoned of course; yet it seems that a private person, and, *a fortiori*, an officer of justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous rioters, may justify the fact, inasmuch as he only does his duty in aid of the public justice.

Sec. 24. And I can see no reason why a person, who without provocation is assaulted by another in any place, whatsoever, in such a manner as plainly shews an intent to murder him, as by discharging a pistol, or pushing at him with a drawn sword, &c. may not justify killing such an assailant, as much as if he had attempted to rob him: For is not he, who attempts to murder me, more injurious than he who barely attempts to rob me? and can it be more justifiable to fight for my goods, than for my life? And is it not only highly agreeable to reason, that a man in such circumstances may lawfully kill another, but it seems also to be confirmed by the general tenor of our law-books, which speaking of homicide *se defendendo*, suppose it done in some quarrel or affray; from whence it seems reasonable to conclude, that where the law judges a man guilty of homicide *se defendendo*, there must be some precedent quarrel in which both parties always are, or at least may justly be supposed to have been, in some fault, so that the necessity, to which a man is at length reduced to kill another, is in some measure presumed to have been owing to himself: For it cannot be imagined, that the law, which is founded on the highest reason, will adjudge a man to forfeit all his goods, and put him to the necessity of purchasing his pardon, without some appearance of a fault. And though it may be said, that there is none in chance-medley, and yet that the party's goods are also forfeited by that, I answer, that chance-medley may be intended to proceed from some negligence, or at least want of sufficient caution in the party, who is so unfortunate as to commit it, so that he doth not seem to be altogether faultless. Besides, one of the reasons given in our law-books for which homicide *se defendendo* forfeits goods, is because thereby a true man is killed; but it seems absurd, that he who apparently attempts to murder another, which is the most heinous of all felonies, should be esteemed such, when those who attempt other felonies, which seem to be much less criminal, are allowed to be killed as downright villains, not deserving the protection or regard of the law.

Sec. 25. However, perhaps in all these cases, there ought to be a distinction between an assault in the highway and an assault in a town. For in the first case it is said, that the person assaulted may justify killing the other without giving back at all; but that in the second case, he ought to retreat as far as he can without apparently hazarding his life, in respect of the probability of getting assistance.* † And by 24 Hen. 8. c. 5. it is

Fult. 119.
Sum. 40.
Crom. 28.
3 Inst. 138.
Popham 121.

Bentley 47.
1 And. 41.
Kely. 123, 129.
1 Hale 431, 434.
Foster 274.

Crom. 27, 28.
Dalt. c. 98.
S. P. C. 15.
3 Inst. 57.
Vide F. C. 7.
284, 286, 287.
Bacon 33.

S. P. C. 15.
Dalt. c. 98.
Foster 274.

N. Bull. 47.
Crom. 27, 28.
Dalt. c. 98.
Sum. 42.
Foster 273.

Puff. 1. 2. c. 5. is recited, "Forasmuch as it hath been in question and ambiguity, that if any evil disposed person or persons do attempt feloniously to rob or murder any person or persons in or nigh any common high-way, cartway, horseway, or foot-way, or in their mansions, messuages, or dwelling-places; or that feloniously do attempt to break open any dwelling house in the night-time, should happen, in the prosecution of such felonious intent, to be slain by him or them whom the said evil doers should so attempt to rob or murder, or by any person or persons being in their dwelling house, which the same evil doers should so attempt burglarly to break by night, if the said person so happening in such cases to slay the offender so attempting to commit murder or burglary, should forfeit or lose his goods or chattles for the same, as any other person should do that by chance medley should happen to kill another in his or their defence." For the declaration of which ambiguity and doubt, it is enacted, "That whoever shall be indicted or appealed of or for the death of such evil disposed person or persons attempting to murder, rob, or burglarly to break mansion houses as aforesaid, shall not forfeit any lands, tenements, goods or chattles, but shall be thereof, and for the same fully acquitted and discharged." (1)

(1) Not only the master of a house, but a lodger or sojourner who kills an assailant, intending to commit murder or robbery, is within the protection of this statute, Cro. Car. 444. But this reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery or arson. 4 Comm. 180. Vide 1 Hale 488. And although it is the highest possible invasion of property, a man is not justified in killing another whom he taketh in adultery with his wife, for it savours more of justice revenge than of self preservation; but this law hath been executed with great benignity. Ven. 159. Ro. 212. Prin. P. L. 212. If the husband however, detect the ravisher in the attempt, the wife calling to assistance, it is excusable *se defendendo*. 1 Hale 486.

Sec. 26. Secondly, Also the killing of an innocent person, in the defence of a man's self, is said to be justifiable in some special cases, as, if two be shipwreck'd together, and one of them get upon a plank to save himself, and the other also, having no other means to save his life, get upon the same plank, and finding it not able to support them both, thrust the other from it, whereby he is drowned, it seems that he, who thus preserves his own life at the expence of that of another, may justify the fact by the inevitable necessity of the case.

Sec. 27. If a man be awakened in the night with an alarm that thieves are in his house, and searching for them in the dark with his sword drawn, happen to kill a person, lying hid in a part of the house, who in truth had no ill design, and was brought thither by a servant in order to assist in cleaning the house, it seemeth that he may justify the fact, inasmuch as it hath not the appearance of a fault.

CHAPTER THE TWENTY-NINTH.

OF EXCUSABLE HOMICIDE.

EXCUSABLE homicide is either *per infortunium*, or *se defendendo*.—In treating of which I shall first shew the nature of each of them distinctly, and then consider those properties wherein they both agree.

Sec7. 1. And first of homicide *per infortunium*, or by misadventure, which is where a man in doing a lawful act (1), without any intent of hurt, unfortunately chances to kill another ;

(1) Whether the act must be strictly lawful to bring the homicide within this description. *Vide Fof. 258, 259. 3 Inst. 56.*

Sec7. 2. As first, Where a labourer being at work with a hatchet, the head thereof flies off, and kills one who stands by.

Sec7. 3. Secondly, Where a third person whips a horse on which a man is riding, whereupon he springs out, and runs over a child and kills him, in which case the rider is guilty of homicide, *per infortunium*; and he who gave the blow, of manslaughter.

Sec7. 4. Thirdly, Where a workman, having first given loud warning to all persons to stand clear, flings down a piece of timber from a private house standing out of the road, and thereby kills one who happens to be underneath:—But if any person fling down such a piece of timber idly in play, or even a workman fling it down in the streets of a town, where the danger is apparent in respect of the number of people continually passing by, he is guilty of manslaughter.

Sec7. 5. Fourthly, Where a schoolmaster in correcting his scholar, or a father his son, or a master his servant, or an officer in whipping a criminal condemned to such punishment, happens to occasion his death. Yet if such persons in their correction be so barbarous, as to exceed all bounds of moderation, and thereby cause the party's death, they are guilty of manslaughter at the least (2), and if they make use of an instrument improper for correction, and apparently endangering the party's life, as an iron bar, or sword, &c. or kick him to the ground, and then stamp on his belly and kill him, they are guilty of murder.

(2) So when an officer of the impress service fires at a boat in order to bring her to, and kills a man, it is impossible that the offender should be made guilty of more than manslaughter, especially if he fires in the manner usual upon such occasions. *L. Mansfield, Cowp. 832.*

Keilw. 108.
B. Cor. 1, 3.
Kely 41.
Prin. P. L. 226.
3 Will. 467.

Sett. 6. Fifthly, Where one lawfully using an innocent diversion, as shooting at butts, or at a bird, &c. by the glancing of an arrow, or such like accident, kills another.

Keilw. 108,
136.
Crom. 29.
11 H. 7. 23.
Foster 260.

Sett. 7. Sixthly, Where a person happens to kill another in playing a match of foot-ball, wrestling, or such like sports which are attended with no apparent danger of life, and intended only for the trial, exercise and improvement, of the strength, courage, and activity of the parties.

11 H. 7. 23.
3 Inst. 160.
1 Hale 473.
Keilw. 108,
136.
Sum. 31.
Dalt. c. 96.
Hob. 134.
Crom. 29.
Con. B. Cor. 22.
Foster 261.

Sett. 8. Seventhly, Where one kills another in fighting at barriers or tilting by the king's command; which by the better opinion, secures him from being guilty of felony, by reason of any such unfortunate accident.—† And under the 22. and 23 Car. 2. c. 25. and the 4 and 5 Will. and Mar. c. 23. made for the preservation of game, where a stranger assisting a game-keeper to seize nets even upon the ground of a third person, and, during the transaction, the gun of the stranger accidentally goes off, by which one of the poachers is killed, this is only chance medley, for the duty of the game-keeper will authorize the trespass of the stranger. (a)

(a) 9 St. Tr. 315.

Sum. 31, 32.
52, 53, 58.
Con. Hob. 134.
Dalt. c. 98.
Aley. 12.
1 Hale 472, 473.
Foster 292.
Strange 409.
6 St. Tr. 195.
4 Comm. 183.

Sett. 9. But if a person kill another by shooting at a deer, &c. in a third person's park, in the doing whereof he is a trespasser; or by shooting off a gun (3), or throwing stones in a city or highway, or other place where men usually resort; or by throwing stones at another wantonly in play, which is a dangerous sport, and has not the least appearance of any good intent; or by doing any other such idle action as cannot but endanger the bodily hurt of some one or other; or by tilting or playing at handword without the king's command; or by parrying with naked swords covered with buttons at the points, or with swords in the scabbards, or such like rash sports, which cannot be used without the manifest hazard of life, he is guilty of manslaughter.

(3) Therefore where the defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman, King, C. J. ruled it to be but manslaughter. Str. 431.

Kely. 117.
1 Hale 39. 475.

Sett. 10. And if a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other; as by committing a riot, robbing a park, &c. he shall be adjudged guilty of murder.

3 Inst. 56.
Kely. 117.
Sup. c. 27.
s. 4.
Sum. 51.

Sett. 11. And *a fortiori* he shall come under the same construction, who in the pursuance of a deliberate intention to commit a felony, chances to kill a man, as by shooting at tame fowl, with an intent to steal them, &c. for such persons are by

no means favoured, and they must at their peril take care of the consequence of their actions, and it is a general rule, That wherever a man intending to commit one felony, happens to commit another, he is as much guilty as if he had intended the felony which he actually commits.

Self. 12. Neither shall he be adjudged guilty of a less crime, who kills another, in doing such a wilful act, as shews him to be as dangerous as a wild beast, and an enemy to mankind in general; as by going deliberately with a horse used to strike, or discharging a gun, among a multitude of people, or throwing a great stone or piece of timber from a house into a street, through which he knows that many are passing; and it is no excuse that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c.

Self. 13. AND now I am to consider homicide *se defendendo*, which seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him, (especially if such attempt be made upon him in his own house,) kills the persons by whom he is reduced to such an inevitable necessity.

Self. 14. And not only he who on an assault retreats to a wall, or some such freight, beyond which he can go no farther, before he kills the other, is judged by the law to act upon unavoidable necessity: but also he who being assaulted in such a manner, and such a place, that he cannot go back without manifestly indangering his life, kills the other without retreating at all.

Self. 15. And notwithstanding a person who retreats from an assault to the wall, give the other wounds in his retreat, yet if he give him no mortal one, till he get thither, and then kill him, he is guilty of homicide *se defendendo* only.

Self. 16. And an officer who kills one that resists him in the execution of his office, and even a private person, that kills one who feloniously assaults him in the highway, may justify the fact without ever giving back at all.

Self. 17. According to some good opinions, even he who gives another the first blow on a sudden quarrel, if he afterwards do what he can to avoid killing him, is not guilty of felony. Yet such a person seems to be too much favoured by this opinion, inasmuch as the necessity to which he is at last reduced, was at the first so much owing to his own fault. And it is now agreed, that if a man strike another upon malice prepense, and then fly to the wall, and there kill him in his own defence, he is guilty of murder.

4 Comm. 186,
188.

Sect. 18. Thus far of each kind of excusable homicide distinctly considered.—And now I am to consider those properties wherein they both agree.

3 Inst. 56.
2 Inst. 149.
F. Cor. 116.
4 Comm. 182.

Sect. 19. And first it seems clear, That neither of these homicides are felonies, because they are not accompanied with a felonious intent, which is necessary in every felony.

11 H. 4. 93.
B. Cor. 80.
15 Ast. 74.
Pott. f. 24.
Fol. 284, 285.

Sect. 20. And from hence it seems plainly to follow, That they were never punishable with loss of life: and the same also farther appears from the writ *de odio & atia*, by virtue whereof, if any person committed for killing another, were found guilty of either of these homicides, and no other crime, he might be bailed; and indeed it seems to be against natural justice, to condemn a man to death, for what is owing rather to his misfortune than his fault.

2 Inst. 56.
S. P. C. 16.
52 Hen. 3.
1 Hale 447.

Sect. 21. It is true indeed, that some of our best authors have argued from the statute of *Marlebridge*, c. 26. which enacts, That, "*Murdrum de cetero non adjudicetur, ubi infortunium tantummodo adjudicatum est, &c.*" That before this statute homicides by misadventure, or *se defendendo*, were adjudged murder, and consequently punished by death.

Bracl. 134.
Kely. 121.
See 1 Hale 445.
448.

Sect. 22. But to this it may be answered, That murder in those days, signified only the private killing of a man by one, who was neither seen nor heard by any witness, for which the offender, if found, was to be tried by ordeal, and if he could not be found, the town in which the fact was done, was to be amerced sixty-six marks, unless it could be proved that the person killed was an *Englismen*; for otherwise it was presumed that he was a *Dane* or *Norman*, who in those days were often privately made away with by the *English*. And it being a doubt whether homicide by misadventure, &c. were to be esteemed murder in this sense, it seems to have been the chief intent of the makers of this statute to settle this question.

Bracl. 135.

Sum. 98 99.
2 Inst. 515.
Dalt. c. 98.
1 Hale 477.
Or they may be brought up by *habeas corpus*, and *valleu*.

Sect. 23. Secondly, It is certain, however, That notwithstanding neither of these offences be felonies, yet a person guilty of them is not bailable by justices of peace, but must be committed till the next coming of the justices of eyre or gaol-delivery.

Reg. 233.
2 Inst. 423, 315.
9 Co. 56.
4 Inst. 182.
Bracl. 123.
Fleta b. 1.
c. 25.
S. P. C. 77.
2 Inst. 43, 315.

Sect. 24. Indeed anciently a person, committed for the death of a man might sue out the writ *de odio & atia*, which by *magna charta*, c. 26. is grantable without fee; and if thereon, by an inquest taken by the sheriff, he were found to have done the fact by misadventure, or *se defendendo*, he might be mainprized by twelve men, upon the writ *de ponendo in ballium*. But such writs and enquiries were taken away by the statute of *Gloucester*, c. 9. and 28 Edw. 3. c. 9. And though perhaps they were again revived by 42 Edw. 3. c. 1. which

which makes all statutes contrary to *magna charta*, void; yet at this day they seem to be obsolete, and indeed useless, inasmuch as the party may probably be sooner delivered in the usual course, by the coming of the justices of goal-delivery.

9 Co. 56.
Co. Bail and
Mainp. c. 10.
Foster 285.
and vide 31 Car.
2. c. 2.

Seft. 25. Thirdly, it is also agreed, That no one can excuse the killing another, by setting forth in a special plea, that he did it by misadventure, or *se defendendo*, but that he must plead Not guilty, and give the special matter in evidence. And that wherever a person is found guilty of such homicide either upon a special indictment for the same, or by a verdict setting forth the circumstances of the case on a general indictment of murder or homicide, he shall be discharged out of prison upon bail and forfeit his goods: But that upon removing the record by *certiorari* into chancery, he shall have his pardon of course, without staying for any warrant from the king to that purpose, as shall be more fully shewn in the second book. ch. 37. sect. 1.

Antec. 28. f. 3.
1 Hale 478.
4 H. 7. 2.
Keilw. 53. 108.
2 Inst. 316.
S. P. C. 15. 16.
F. Cor. 297.
354. 361.
Dalt. c. 96. q. 8.
F. N. B. 246.
Foster ch. 4.

CHAPTER THE THIRTIETH.

OF MANSLAUGHTER.

HOMICIDE against the life of another, amounting to felony, is either with or without malice.

Foster c. 2.
Dist. 21.

Seft. 1. That which is without malice is called manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all.

4 Com. 186, 107.
Prin. P. L. 215.
219, 224.
3 Inst. 55, 57.
Dalt. c. 94.
Sum. 56, 57.
1 Hale 466.

Seft. 2. And from hence it follows, That there can be no accessaries to this offence before the fact, because it must be done without premeditation.

Sum. 217.
b. 2. c. 29.
f. 24.

Seft. 3. But the learning relating to this head, being for the most part co-incident with that of others, it will be superfluous to enlarge on it here; and therefore I shall refer the reader to other chapters for the particular case; as to the following chapter of murder from section 21 to 32. for those concerning duelling; and to the said chapter, sections 47, 48, 49. and to chapter 28. sections 14, 15. for such as happen in a riot, &c. and to chapter 29 from section 6 to section 13. for such as fall out in the execution of a rash unlawful action.

Co. Lit. 127.
Kely. 55. 133.
1 Hale 456.

Seft. 4. But there is a particular kind of manslaughter proper to be considered here, from which the benefit of the clergy is taken away by 1 Jac. 1. c. 8. "Where any per-

"son shall stab or thrust any person or persons that hath not then any weapon drawn, or that hath not then first stricken, the party which shall so stab or thrust, so as the person or persons so stabbed or thrust, shall thereof die within the space of six months then next following, although it cannot be proved that the same was done of malice forethought." (1)

(1) This act is continued by 17 Car. 1. c. 4. "till some other act shall be made touching the continuance or discontinuance thereof."—For the reasons and occasion upon which it was passed, vide 4 Com. 193. Fost. 297. L. Ray. 140. 845. 7 Mod. 133. Skin. 668.

1 Bull. 87.
Kely. 55.
1 Hale 456.
Fos. 293.

Sec. 5. It is generally holden, that this statute is but declarative of the common law, and in the construction thereof, the following points have been resolved.

1 Jon. 340.
Vide Skin. 668.
where Lord Holt
questions Bry-
ant's case.

Sec. 6. First, That wherever a person who happens to kill another was struck by him in the quarrel before he gave the mortal wound, he is out of the statute though he himself gave the first blow.

Sum. 58.
1 Hale 468.
2 Hale 544.
Sec b. 2. c. 33.
1. 98.
Stiles 86.
Salk. 542, 543.
Prin. P. L. 232.
Fos. 301.
Alley 44.

Sec. 7. Secondly, That he only who actually gives the stroke, and not any of those who may be said to do it by construction of law, as being present, and aiding and abetting the fact, are within the statute: from whence it follows, That if it cannot be proved by whom the stroke was given, none can be found guilty within the statute.

1 Jones 432.
continued by
Holt in Maw-
gridge's case,
Kely. 131.
Skin. 668.
3 Lev. 266, 255.

Sec. 8. Thirdly, That the killing of a man with a hammer, or such like instrument, which cannot come properly under the words thrust, or stab, is not a killing within the statute.—But it seems that the discharging a pistol, or throwing a pot, or other dangerous weapon at the party, is within the equity of the words, "having a weapon drawn;" for penal statutes are construed strictly against the subject, and favourably and equitable for him.

Sec b. 2. c. 25.
f. 117.
Sum. 58, 266.
Alley 47.

Sec. 9. Fourthly, That there is no need to lay the conclusion of the indictment *contra formam statuti*, because the statute makes no new offence, but only takes away the privilege of the clergy from an old one, and leaves it to the judgment of the common law; from whence it follows, That a person indicted on the statute, may be found guilty of manslaughter generally. Also from the same ground it hath been resolved, That if both an indictment lay, and a verdict also find, a fact to be *contra formam statuti*, which cannot possibly be so, as that A. and B. aided and abetted C. *contra formam statuti*, yet neither such indictment nor verdict are void, but A. and B. shall be dealt with in the same manner as they should have been, if those words *contra formam statuti* had been wholly omitted, because the substance of the indictment being found, they may be rejected as surplus and senseless: And, *a fortiori*, therefore it is certain, that they shall do no hurt to an indictment

Cro. Jac. 282.

dictment or verdict containing a fact which may be within the statute.

Sec. 10. Fifthly, How far the words *contra formam statuti*, supply a defect in an indictment, which does not specially pursue the statute, see the second book, chapter 25. section 116. See 1 Hale 467 to 470.

A PRISONER whose case may be brought within this statute is commonly arraigned upon two indictments, one at common law for murder, and the other upon the statute 10th Edw. 3. c. 2. But the same circumstances which at common law will serve to justify, excuse, or alleviate in a charge of murder, have always had their due weight in prosecutions grounded upon this statute. 10th Edw. 3. c. 2. As where a husband slays an adulteress whom he seizes in the act. 1 Vent. 158. Raym. 212. Or where a man is assaulted by thieves in his house, the thieves having no weapon drawn, nor having struck him; and he kills one of them. Stra. 469. Or where an officer entering violently into the chamber of a gentleman to arrest him, but without announcing the purpose for which he came, is stabbed by the gentleman with his sword. Kely. 136. 1 Hale 470. Styles 467. Or where upon an outcry of thieves, a person who had innocently hidden himself in a closet, was mistaken for the thief and slain in the dark. 1 Hale 42. 474. C. Car. 538. W. Jones 429. Kely. 136. and many other instances of these kinds which have been held not within the statute.

CHAPTER THE THIRTY FIRST,

OF MURDER.

HOMICIDE against the life of another, amounting to felony with malice, is either murder or petit treason.

Sec. 1. And first of murder, which anciently signified only the private killing of a man, for which by force of a law introduced by king Canutus for the preservation of his Danes, the town or hundred where the fact was done, was to be amerced (a) to the king, unless they could prove that the person slain were an *Englishman*, (which proof was called *Englshire*), or could produce the offender, &c. And in those days, the open wilful killing of a man through anger or malice was not called murder, but voluntary homicide.

(a) The amercement is 46 marks. Wilk. Ang Sax. 280

But the said law concerning *Englshire*, having been abolished by 14 Edw. 3. c. 4. the killing of any *Englishman* or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Rich. 2. c. 1. which retrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicide as shall not be pardoned without special words; and in the body of the act expresses the same by murder, or killing by await, assault, or malice prepensed. And doubtless the makers of 23 Hen. 8. c. 1. which excluded all wilful murder of malice prepense from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder.

Dialog. de Scach. 1. 1.
10. Stern. jur. 879, 1. 3. c. 3.
Glanv. 1. 14. c. 3.
Foster 281.
Stat. Malbr. c. 26.
Prin. P. L. 231.
Bract. 134, 135.
Kely. 121, &c.
1 Hale c. 447.
Bract. 121.

S. P. C. 18, 19.
1 Hale 448.

Stamf. l. r. c. 10.
1 Hale 450.
3 Inst. 47.

Sec. 3. By murder therefore at this day we understand the wilful killing of any subject whatsoever, through malice forethought, whether the person slain be an *Englishman* or foreigner.

And for the better understanding hereof, I shall examine the following particulars:—First, In what cases a man may be said to kill another. Secondly, In what places such killing is within the cognizance of the law. Thirdly, Who are such persons by killing of whom a man may commit murder. Fourthly, What killing shall be adjudged to be malice prepense, or murder.

4 Comm. 196.
1 Hale 425, 432.
3 Inst. 48, 91.
Sum. 57.
Palm 548.
1 Inst. 295.
2 Hawk. c. 29,
31.
9 Str. Tr. 246
to 251.

Sec. 4. As to the first point, viz. In what cases a man may be said to kill another; not only he who by a wound or blow, or by poisoning, strangling, or famishing, &c. directly causes another's death, but also in many cases, he who by willfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death, shall be adjudged to kill him.

Crom. 24, 90.
Pult. 123.
Dalt. c. 93.
1 Hale 431, 432.

Sec. 5. And such was the case of him who carried his sick father against his will, in a cold frosty season, from one town to another, by reason whereof he died.

Crom. 24.
Dut. c. 93.
1 Hale 432.

Sec. 6. Such also was the case of the harlot, who being delivered of a child, left it in an orchard covered only with leaves, in which condition it was struck by a kite, and died thereof.

(a) S. P. C. 56. c.
1 Inst. 91.
Vide 14 Edw. 3.
c. 16.
(b) Dalt. c. 93.
Sum. 57.
1 Hale 432.
(c) Plowd. 474.

Sec. 7. And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress (a) of imprisonment compels a man to accuse an innocent person who on his evidence is condemned and executed; or where one incites a (b) madman to kill himself or another; or where one lays (c) poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof.

9 Co. 81.
1 Hale 430,
431, 617.
F. Cor. 311.
S. P. C. 17.
Crom. 24.
Dalt. c. 93.
1 Inst. 122.
Sum. 53.
Exclus. c. 21.
v. 29.
L. Raym. 143.
Prin. P. L. 236.

Sec. 8. Also he who wilfully neglects to prevent a mischief, which he may, and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and therefore if a man have an ox or horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions, the owner may be indicted, as having himself feloniously killed him; and this is agreeable to the *Mosical* law. However, as it is agreed by all, such a person is certainly guilty of a very gross misdemeanour.

Sec. 9.

Secl. 9. Also it is agreed, That no person shall be adjudged by any act whatever to kill another, who doth not die thereof within a year and a day after; in the computation whereof the whole day on which the hurt was done shall be reckoned the first.

Sum. 55.
Pult. 123.
Dalt. c. 93.
S. P. C. 21.

Secl. 10. But if a person hurt by another, die thereof within a year and a day, it is no excuse for the other that he might have recovered, if he had not neglected to take care of himself.

3 Inst. 63.
Kely. 26.
1 Keb. 17.
1 Hale 428.
Prin. F. L. 234.

A goaler, knowing a prisoner to be infected with an epidemick distemper, confines another prisoner against his will, in the same room with him, by which he catches the infection, of which the goaler had notice, and the prisoner dies; this is a felonious killing, *Stra. 856. 9 St. Tr. 146.* So, to confine a prisoner in a low damp unwholesome room, not allowing him the common conveniences which the decencies of nature require, by which the habits of his constitution are so affected as to produce a distemper of which he dies; this also is felonious homicide. *Stra. 884. Ld. Raym. 1578.*—For although the law invests goalers with all necessary powers for the interest of the commonwealth, they are not to behave with the least degree of wanton cruelty to their prisoners. *O. B. 1784. p. 1177.* And these were deliberate acts of cruelty, and enormous violations of the trust the law reposes in its ministers of justice. *Foster 322.*

So also, any one who assuming to take care of another, refuses the necessary subsistence, or by any other severity though not of a nature to produce immediate death, as by putting the party in such a situation as may possibly be dangerous to life or health, if death actually and clearly ensues in consequence of it, it is murder.—And this mode of killing is of the most aggravated kind, because a long time must unavoidably intervene before the death can happen, and also many opportunities of deliberation and reflection. *O. B. 1784. p. 455. and Rex. v. S. Self. O. B. Feb. Seff. 1776.*

So also, by the old common law, to bear false witness, and with express premeditation, by this means to take away the life of another, was held to be murder. *Mirr. c. 1. 1. 19. Brit. c. 5. Bract. l. 3. c. 4.* But it is said, that this enormous crime can hardly be so considered at this day. 3 Inst. 48. The authority, however, for this opinion, in *Foster 331.* is said by no means absolutely to warrant the conclusion. 4 Comm. 196.

Secl. 11. As to the second point, viz. In what places such killing is within the consuance of the law. It seems, That the killing of one who is both wounded and dies out of the realm, or wounded out of the realm and dies here, cannot be determined at common law, because it cannot be tried by a jury of the neighbourhood where the fact was done. But it is agreed, That the death of one who is both wounded and dies beyond sea; and it is said by some, That the death of him who dies here of a wound given there, may be heard and determined before the constable and marshal, according to the civil law, if the king please to appoint a constable. And it seemeth also to be clear, That such a fact being examined by the privy council, may by force of 33 Hen. 8. c. 23. be tried, in relation to the principal offenders, but not as to the accessaries, before commissioners appointed by the king in any county in England.

3 Inst. 48.
1 Hale 426.
2 Inst. 51.
Co. Lit. 75.
S. P. C. 65.
B. App. 153.
C. Car. 247.
b. 2. c. 23.
f. 12.
3 Keb. 785.
Con. 3 Keb.
715.
1 And. 195.

Secl. 12. A murder at sea was anciently cognizable only by the civil law, but now by force of 27 Hen. 8. c. 4. and 28 Hen. 8. c. 15. it may be tried and determined before the

3 Inst. 48, 49.

1 Leon. 270.
Sum. 54.
3 Inst. 48.
Vide 4 Black.
Rep. 459.

king's commissioners (1) in any county of England according to the course of the common law. Yet the killing of one who dies at land of a wound received at sea, is neither determinable at common law, nor by force of either of these statutes: but it seems, that it may be tried by the constable and marshal, or before commissioners appointed, in pursuance of the aforesaid statute of 33 Hen. 8. c. 23.

(1) Namely, the admiral or his deputy and three or four more (among whom two common law judges are constantly appointed, who in effect try all the prisoners) the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury. This is now the only method of trying marine felonies in the court of admiralty: The judge of the admiralty still presiding therein, just as the lord mayor presides at the Sessions in London. 4 Comm. 266.

+ And for preventing any failure of justice, and for taking away all doubts touching the trial of murders in the cases hereinafter mentioned, it is enacted by the 2 Geo. 2. c. 21.
“ That where any person shall be feloniously stricken or poisoned upon the sea, or at any place out of *England*, and shall die of the same stroke or poisoning within *England*;—or
“ where any person shall be feloniously stricken or poisoned at any place within *England*, and shall die of the same stroke or poisoning upon the sea, or at any place out of *England*;
“ an indictment thereof found by the jurors of the county of *England* in which such death, stroke, or poisoning shall happen respectively as aforesaid, whether before the coroner upon the view of such dead body; or before the justices of the peace, or other justices or commissioners who shall have authority to enquire of murders, shall be as good and effectual in law as well against the principals and accessaries as if such felonious stroke and death, or poisoning and death, and the offence of such accessaries had happened in the same county where such indictment shall be found;
“ and the justices of gaol delivery and oyer and terminer in the same county; and also any superior court, in case such indictment shall be removed, &c. shall and may proceed upon the same in all points, as they might or ought to do in case such stroke, poisoning or death, &c. had happened in the same county where such indictment shall be found.”

3 Inst. 48, 49.
1 Hale 426.
B. Col. 140,
141, 143.
Indict. 13, 45.
S. P. C. 90.
6 H. 7. 10.
Finch. 411.
S. P. C. 182. c.
45 Aff. 9.
B. App. 3, 80,
83, 85, 149.

Sect. 13. It is said by some, That the death of one who died in one county, of the wound given in another, was not indictable at all at common law, because the offence was not compleat in either county, and the jury could enquire only of what happened in their own county. But it hath been holden by others, That if the corps were carried into the county where the stroke was given, the whole might be enquired of by a jury of the same county: And it is agreed, That an appeal might be brought in either county, and the fact tried by a jury returned jointly from each: And at this day, by force of

of 2 and 3 Edw. 6. c. 24. the whole is triable by a jury of the county where the death shall happen, on an indictment found, or appeal brought, in the same county.

Señ. 14. Also by force of 26 Hen. 8. c. 6. a murder in Wales may be enquired of in an adjoining English county. But appeals must still be brought in the proper county.

1 Lev. 118. Latch. 12, 118. 3 Inst. 50. 8 Mod. 136, 146. Stra. 502, 553. 6 Mod. 147. Vaugh. 413. Sid. 179. Keb. 621, 663, 677. Will. 320. Atk. 175, 182. Vent. 93.

Señ. 15. As to the third point, viz. Who are such persons by killing of whom a man may commit murder. It is agreed, that the malicious killing of any person, whatsoever nation or religion he be of, or of whatsoever crime attainted, is murder.

Señ. 16. And it was anciently holden, That the causing of an abortion, by giving a potion to, or striking, a woman big with child, was murder. But at this day, it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof, in which case it seems clearly to be murder, notwithstanding some opinions to the contrary (a). And in this respect also, the common law seems to be agreeable to the *Mosaic*, which as to this purpose is thus expressed, "If men strive and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow, he shall be surely punished, according as the woman's husband will lay upon him, and he shall pay as the judges determine; and if any mischief follow, then thou shalt give life for life."

Señ. 17. It seems also agreed, That where one counsels a woman to kill her child when it shall be born, who afterwards does kill it in pursuance of such advice, he is an accessory to the murder. † But in the case of the murder of bastard children by the unnatural mother, it is difficult to prove that the child was born alive; and it is therefore enacted by 21 Jac. 1. c. 27. made perpetual by 16. Car. 1. c. 4. "That if any woman be delivered of any issue of her body, male or female, which being born alive, should by the laws of this realm be a bastard, and she endeavour privately, either by drowning or secret burying thereof, or any other way, either by herself, or the procuring of others, so to conceal the death thereof, as that it may not come to light, whether it were born alive or not, but be concealed, except such mother can prove by one witness that such child was born dead, she shall suffer death as in case of murder."

Señ. 18. As to the fourth point, viz. What killing shall be adjudged of malice prepense or murder. It is to be observed, That any formed design of doing mischief, may be called

B. 2. c. 24.
L. 39, 40.
C. Car. 247.
498, 533.
1 Jon. 255.

Bract. 121.
S. P. C. 21.
B. Cor. 91.
Sum. 53.
F. Cor. 146.
183, 263.
(a) Vide Hale
433.
23 Aff. 94.
b. 2. c. 49.
f. 18.
3 Inst. 50.
3 Aff. 2.
B. Cor. 68.
Dalt. c. 93.
Exodus c. 21.
v. 22, 23.

Dyer 126.
1 Hale 433.
429.
3 Inst. 51.
Kely. 127.

4 Comm. 193.
Barrington 425.
Prin. P. L. 16.
O. B. 1784. p.
1223.

Fost. 256, 257.
Kely. 130.
1 Hale 451 to
454.

called malice; and therefore that not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also in many other cases, such as is accompanied with those circumstances that shew the heart to be perversely wicked, is adjudged to be of malice prepense, and consequently murder.

Kely. 129, 130.
1 Hale 455, &c.
9 St. Tr. 715.
Prin. P. L. 236.

Sec. 19. And according to this notion, I shall consider, First, Such murder as is occasioned through an express purpose to do some personal injury to him, who is slain in particular, which seems to be most properly called express malice.—Secondly, Such as happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who is slain, in which case the malice seems to be most properly said to be implied.

Sec. 20. As to murder in the first sense, such acts as shew a direct and deliberate intent to kill another, as poisoning, stabbing, and such like, are so clearly murder, that I know not any questions relating thereto worth explaining.

But the cases which have borne dispute, have generally happened in the following instances—First, In duelling.—Secondly, In killing another without any provocation, or but upon a slight one.—Thirdly, In killing one whom the person killing intended to hurt in a less degree.

Bulst. 86, 87.
Kely. 129.
10 St. Tr. 139.

(a) 2 Bulst. 147.
Crom. 22.
(1) 1 Roil. 363.
3 Bulst. 171.
Sum. 43.
1 Hale 452, 453.
O. B. 1784.
Nº 776.

Sec. 21. As to the first instance of this kind, it seems agreed, that wherever two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alledging that he was (a) first struck by the deceased; or that he had often (b) declined to meet him, and was prevailed upon to do it by his importunity; or that it was his only intent to vindicate his reputation; or that he meant not to kill, but only to disarm, his adversary: For since he deliberately engaged in an act highly unlawful, in defiance of the laws, he must at his peril abide the consequences thereof.

3 Inst. 51.
Sum. 48.
Kely. 36.
1 Lev. 80.
Foster. 297.
Oneby's case, 9
St. Tr. 22.

Sec. 22 And from hence it clearly follows, That if two persons quarrel over night, and appoint to fight the next day; or quarrel in the morning, and agree to fight in the afternoon; or such a considerable time after, by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder.

Sec. 23.

Sett. 23. And wherever it appears from the whole circumstances of the case, That he who kills another on a sudden quarrel, was master of his temper at the time, he is guilty of murder; as if after the quarrel he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration, as to say, that the place wherein the quarrel happens is not convenient for fighting; or that if he should fight at present, he should have the disadvantage by reason of the height of his shoes, &c.

Kely. 56. 27.
1 Sid. 177.
Foster 297.
Strange 773.
Ld. Ray. 1489.
1493.

1 Lev. 120.

Sett. 24. And if A. on a quarrel with B. tell him that he will not strike him, but that he will give B. a pot of ale to strike him, and thereupon B. strike, and A. kill him, he is guilty of murder, for he shall not elude the justice of the law by such pretence to cover his malice.

Sum. 48.

Sett. 25. In like manner if B. challenge A. and A. refuse to meet him, but in order to evade the law, tell B. that he shall go the next day to such a town about his business, and accordingly B. meet him the next day in the road to the same town, and assault him, whereupon they fight, and A. kills B. he seems guilty of murder, unless it appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.

1 Hale 453.
Con. Crom. 220.
and Sum. 48.

Sett. 26. And at this day it seems to be settled, That if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there in his own defence, he is guilty of murder, in respect of his first intent.

Crom. 22.
Dalt. 93.
Sum. 47.
Kely. 58, 129.

Sett. 27. And it hath been adjudged, That even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another, as to make a push at him with a sword, or strike at him with any other such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation, than if there had been none at all.

Crom. 23.
Dalt. c. 93.
Kely. 61. 131.
Ld. Ray. 1489.
9 St. Tr. 62.

Sett. 28. But it is said, That if he who draws upon another in a sudden quarrel, make no pass at him till his sword is drawn, and then fight with him, and kill him, he is guilty of manslaughter only, because that by neglecting the opportunity of killing the other before he was on his guard, and in a condition to defend himself, with a like hazard to both, he shewed that his intent was not so much to kill, as to combat with the other, in compliance with those common notions of honour, which prevailing over reason, during the time that

Kely. 55, 61,
131.
Ld. Ray. 1493.
10 St. Tr. 518.
Foster 297.
2 Roll 461.

a man is under the transports of a sudden passion, so far mitigate his offence in fighting, that it shall not be adjudged to be of malice prepenſe.

Sum. 48.
3 Inst. 51.
1 Hale 453.
3 Bull. 17.

ſect. 29. And if two happen to fall out upon a sudden, and preſently agree to fight, and each of them fetch a weapon, and go into the field and there one kill the other, he is guilty of manſlaughter only, becauſe he did it in the heat of blood.

1 Hale 453.
Crom. 23.
Dalt. c. 93.
Sum. 49.
1 Roll 360.
3 Bull. 173.

ſect. 30. And ſuch an indulgence is ſhewn to the frailties of human nature, That where two perſons who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a freſh quarrel, it ſhall not be preſumed that they were moved by the old grudge, unleſs it appear by the whole circumſtances of the fact.

Sum. 51.
Dalt. c. 93.
1 Freeman 514.
O. B. 1784 p.
1043.
1 Hale 443.
Sum. 51.
17 St. Tr. 114.
Pinn. P. L. c. 19.

ſect. 31. But the law ſo far abhors all duelling in cold blood, That not only the principal who actually kills the other, but alſo his ſecond are guilty of murder, whether they fought or not; and ſome have gone ſo far as to hold, that the ſeconds of the perſon killed are alſo equally guilty, in reſpect to that countenance which they give to their principals in the execution of their purpoſe, by accompanying them therein, and being ready to bear a part with them: But ſome have thought this rather too ſevere a conſtruction to make a man by ſuch reaſoning the murderer of his friend, to whom he was ſo far from intending any miſchief, that he was ready to hazard his own life in his quarrel.

Foſter 255.
Ld. Ray. 1493.
Kely. 27.
Strange 773.

ſect. 32. And now I am to conſider the ſecond inſtance of this kind, viz. ſuch murder as happens in killing another without any provocation, or but upon a ſlight one; as to which it is to be obſerved, that wherever it appears that a man killed another, it ſhall be intended, *prima facie*, that he did it maliciously, unleſs he can make out the contrary, by ſhewing that he did it on a ſudden provocation, &c.

Cro. Ellz. 694.
Ld. Ray. 144.
1 Inst. 557.
(a) Kely. 135.
1 Hale 455, 456.
473.
1 Roll. 460, 461.
(b) K. ly. 131.
&c.
Dalt. c. 93.
(c) L. 442. 779.
Noy 173.
1 Sid. 277.
1 Lev. 180.
Hob. 121.
Con. i. ſum. 452.
Kely. 55, 61.
131. C. Jac. 295.
422. Styles 467.

ſect. 33. Alſo it ſeems to be agreed, That no (a) breach of a man's word or promiſe, no treſpaſs either to (b) lands or goods, no affront by bare (c) words or geſtures however falſe or malicious it may be, and aggravated with the moſt provoking circumſtances, will excuſe him from being guilty of murder, who is ſo far tranſported thereby, as immediately to attack the perſon who offends him, in ſuch a manner as manifeſtly endangers his life, without giving him time to put himſelf upon his guard, if he kills him in purſuance of ſuch aſſault, whether the perſon ſlain did at all fight in his defence or not; for ſo baſe and cruel a revenge cannot have too ſevere a conſtruction.

Vide Foſ. 295.
1 Hale 456.

ſect. 34. But if a perſon ſo provoked had beaten the other only in ſuch a manner, that it might plainly appear that he

meant not to kill, but only chastise him; or if he had restrained himself till the other had put himself on his guard; and then in fighting with him had killed him, he had been guilty of manslaughter only.

Sett. 35. And of the like offence shall he be adjudged guilty, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other.

Sett. 36. Neither can he be thought guilty of a greater crime, who (a) finding a man in bed with his wife, or being actually (b) struck by him, or pulled by the nose, or filched upon the forehead, immediately kills him; or, (c) who happens to kill another in a contention for the wall; or (d) in the defence of his person from an unlawful arrest; or (e) in the defence of his house from those who claiming a title to it attempt forcibly to enter it, and to that purpose shoot at it, &c. or in (f) the defence of his possession of a room in a publick house, from those who attempt to turn him out of it, and thereupon draw their swords upon him; in which case the killing the assailant hath been holden by some to be justifiable: But it is certain, That it can amount to no more than manslaughter.

Sett. 37. Nor was he judged criminal in a higher degree, who seeing his son's nose bloody, and being told by him, That he had been beaten by such a boy, ran three quarters of a mile, and having found the boy, beat him with a small cudgel, whercof he afterwards died. (1)

(1) Nor was he thought more criminal, who, duped and encouraged by a concourse of people, threw a pickpocket into a pound, adjoining to the road, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned; for although this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature where certain provocations are given. O.B. 1785. No. 751.—So also where three Scotch soldiers were drinking together in a public house, one of them struck some strangers who were drinking in another box with a small rattan; they having used several opprobrious epithets, and reviled the character of the Scotch nation. An altercation ensued; and one of the strangers laid hold of the soldier who had stricken, and threw him against a settle. The altercation increased, and, when the soldier had paid the reckoning, the stranger again shoved him from the room into the passage. Upon this the soldier exclaimed, that “he did not mind killing an Englishman more than eating a morsel of crowdy.” The stranger, assisted by another person, then violently pushed the soldier out of the house, whereupon the soldier instantly turned round, drew his sword, and stabbed the stranger to the heart. This was adjudged manslaughter. Lord Mansfield, 5 Burr. 2799. Vide also the King v. Snow, tried before Mr. Justice Willes, Sum. Ass. Northampton, 1786, and Rex v. John Brown for the murder of J. Maccaffer, June 1776. But in these, and indeed in every other case of homicide upon provocation now great suaver it be, if there is a sufficient time for passion to subside, and for reason to interpose, such homicide will be murder. Foll. 273, 296. 1 Hale, 486. 1 Vent. 158. Ray. 212.

Sett. 38. AND now we are come to the third instance of this kind, viz. Such murder as happens in killing one whom the person killing intended to hurt in a less degree; as to which it is to be observed, That wherever a person in cool

blood,
Jones 198. Palm. 385. Str. 771. Ld. Ray. 1489, 1493.

blood, by way of revenge, unlawfully and deliberately beats another in such a manner, that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far.

C. Car. 131.
W. Jon. 198.
Palm. 545.
Kely. 127.
Sum. 49.
1 Hale 454.
Folter 292.

Self. 39. Also it seems, That he, who upon a sudden provocation, executeth his in such a cruel manner, as shews a cruel and deliberate intent to do mischief, is guilty of murder, if death ensue; as where the keeper of a park, finding a boy stealing wood, tied him to a horse's tail and beat him, whereupon the horse ran away and killed him.

Self. 40. AND now I am to consider the second general branch of this head, *viz.* In what cases such killing shall be adjudged murder which happens in the execution of an unlawful action, principally intended for some other purpose, and not to do a personal injury to him in particular who happens to be slain.

And this I shall consider in the following instances:—First, Where the principal intention is to commit another felony.—Secondly, Where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain.—Thirdly, Where the chief motive is to assist a third person.—Fourthly, Where the direct design is to escape from an arrest.—Fifthly, Where the principal purpose is to usurp an illegal authority.—Sixthly, Where no mischief is intended at all.

1 Hale 465,
474.
Sum. 50.
Kely. 117.
Prin. P. L. 225.
Sum. 46, 50.
Dalt. c. 93.
Moor 87.
Plow. 101.

Self. 41. As to the first particular, *viz.* Such killing as happens in the execution of an unlawful action, whereof the principal intention was to commit another felony. It seems agreed, That wherever a man happens to kill another in the execution of a deliberate purpose to commit any felony, he is guilty of murder; as where a person shooting at tame fowl, with an intent to steal them, accidentally kills a man; or where one sets upon a man to rob him, and kills him in making resistance; or where a person shooting at, or fighting with one man, with a design to murder him, misses him and kills another.

Plow. 474.
3 Inst. 51.
1 Hale, 436,
441, 467.
9 Co. 81.

Self. 42. And not only in such cases where the very act of a person having such a felonious intent, is the immediate cause of a third person's death, but also where it any way occasionally causes such a misfortune, it makes him guilty of murder; and such was the case of the husband, who gave a poisoned apple to his wife, who eat not enough of it to kill her, but innocently, and against the husband's will and persuasion, gave part of it to a child who died thereof; such also was the case of the wife, who mixed ratbane in a potion sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who to vindicate his reputation tasted it himself, having first stirred it about. Neither is it

it material in this case, That the stirring of the potion might make the operation of the poison more forcible than otherwise it would have been; for inasmuch as such a murderous intention, which of itself perhaps in strictness might justly be made punishable with death, proves now in the event the cause of the king's losing a subject, it shall be as severely punished as if it had had the intended effect, the missing whereof is not owing to any want of malice, but of power.

Sec. 43. But if one happen to be poisoned by ratsbane laid in order to destroy vermine, the person by whom he is so killed is guilty of homicide *per infortunium* only, because his intentions were wholly innocent.

Plow. 474.
9 Co. 81.
1 Hale, 431.
Sum. 50.

Sec. 44. Also if a third person accidentally happen to be killed by one engaged in a combat with another upon a sudden quarrel, it seems that he who kills him is guilty of manslaughter only. But it hath been adjudged, That if a justice of peace, constable, or watchman, or even a private person, be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed, is guilty of murder; and that he cannot excuse himself by alledging that what he did was in a sudden affray in the heat of blood, and through the violence of passion; for he who carries his resentment so high, as not only to execute his revenge against those who have affronted him, but even against such as have no otherwise offended him but by doing their duty, and endeavouring to restrain him from breaking through his, shews such an obstinate contempt of the laws, that he is no more to be favoured, than if he had acted in cool blood.

1 Hale 441.
446, 457.
Sum. 455.
3 Inst. 52.
Dalt. c. 93.
F. Cor. 180.
Savil 67.
Kely. 66.
22 Aff. 71.
4 Co. 40.
9 Co. 68.
Crom. 25.
Fol. 308, 309.

Sec. 45. Yet it hath been resolved, That if the third person slain in such a sudden affray do not give notice (2) for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary.

Kely. 66, 115.
Fol. 310, 311.
Staunf. 13.
1 Hale 442,
460, 461.
Ld. Ray. 1296.

(2) If the officer be within his proper district, and known, or but generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day time. Foster 135, 311.

Sec. 46. As to the second instance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, where the principal design is to commit a bare breach of the peace, not intended against the person of him who happens to be slain. It seems clear, That regularly, where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, hunting in a park, &c. and in so doing happen to kill a man, they are all guilty of murder; for they must at their

1 Hale 442, 443.
463, 534.
Sav. 67.
Moor 86.
Palm. 35.
Crom. 24, 25.
Sum. 47.
5 Mod. 289.
Dyer 128.
S. P. C. 17.
Foster 354.
9 St. Tr. 715.

peril abide the event of their actions, who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation. (3)

(3) The fact however must appear to have been committed strictly in prosecution of the purpose for which the party was assembled, Prin. P. L. 234. Therefore if divers persons be engaged in an unlawful act, and one of them with malice prepenſe against one of his companions, finding an opportunity, kills him, the rest are not concerned in the guilt of that act. Kely. 122. because it hath no connection with the crime in contemplation. Prin. P. L. 235. So where two men were beating another man in the street, a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife. Both the men were indicted as principals in the murder, yet, although both were doing an unlawful act in beating the man, as the death of the stranger did not ensue upon that act and it appearing that only one of them intended any injury to the person killed, the judges were of opinion that the other could not be guilty either as principal or accessory, and upon the case of the King v. Thomson, Kely. 66, 67. he was acquitted, 8, Mod. 164. Trin. 9 Geo. 1. and 12 Mod. 629. Hill. 13 W. 3. Yet see 12 Mod. 256.

Crom. 28.
Sum. 56.
1 Hale 440.
441.
Foster 312.

Sec. 47. Yet where diverse rioters having forcible possession of a house, afterwards killed a person whom they had ejected, as he was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty of manslaughter only, notwithstanding they did the fact in maintenance of a deliberate injury, perhaps for this reason, because the person slain was so much in fault himself.

Sum. 45.
Dalt. c. 93
3 Inst. 52.
Kely. 66.
22 Ass. 71.
4 Co. 40.
9 Co. 69.
Crom. 25.

Sec. 48. But if in such or any other quarrel, whether it were sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with as much obstinacy, as to go on in it to the hazard of the lives of those who no otherwise offend him, but by doing their duty in maintenance of the law, which therefore affords them its more immediate protection, he seems to be in this respect equally criminal, as if his intention had been to commit a felony.

1 Hale, 437.
446.
Flow. 100, 101.
Crom. 23.
Dalt. c. 93.
Sum. 51, 52.
Savil. 67.
Palm. 30.

Sec. 49. As to the third instance of this kind, viz. such killing, as happens in the execution of an unlawful action, the principal motive whereof was to assist a third person. It seems clear, that if a master maliciously intending to kill another take his servants with him, without acquainting them with his purpose, and meet his adversary and fight with him and the servants seeing their master engaged take part with him, and kill the other, they are guilty of manslaughter only, but the master of murder.

Crom. 26.
Sum. 52, 57.
Dalt. c. 94.
1 Roll. 427.
408.
3 Bish. 206.
Comp. 832.

Sec. 50. And therefore it follows, *a fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, see him fighting with another, and side with him, and kill the other; or seeing his sword broken send him another, wherewith he kills the other, he is guilty of manslaughter only.

Kely. 67, 66,
87.
Fost. 318, 319.
12 Mod. 161.

Sec. 51. Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c. in

in the due execution of his duty, such friend or servant, &c. are guilty of murder, whether they knew that the person slain were an officer or not.

Sett. 52. But perhaps it may be objected, That in this last case there seems to be no more malice than in the former; and such third person being wholly ignorant that the party killed was an officer, seems to be no more in fault than if he had been a private person.

Sett. 53. To this it may be answered, That all fighting is highly unlawful, and that he, who on a sudden seeing persons engaged in it, is so far from endeavouring to part them, as every good subject ought, that he takes part with one side, and fights in the quarrel, without knowing the cause of it, shews a high contempt of the laws, and a readiness to break through them on a small occasion, and must at his peril take heed what he does, and consequently might perhaps in strict justice be adjudged in the foregoing cases to act with malice, which doth not always signify a particular ill will against the person killed, as appears by many of the above-mentioned cases; and though such person be favoured in respect of the suddenness of the occasion, where both the quarrel and the persons are private, yet he must not expect such indulgence where the fight, in which he so rashly engages, was begun in open opposition to the justice of the nation, and a person happens to be killed thereby who engaged in maintenance thereof, and on that account is under its more particular care; and may justly challenge, that his opposers be made examples to deter others from joining in such unwarrantable quarrels.

Sett. 54. But if a man seeing another arrested and restrained from his liberty, under colour of a press-warrant or civil process, &c. by those who in truth have no such authority, happen to kill such trespassers in rescuing the person oppressed, he shall be adjudged guilty of manslaughter only, notwithstanding the injured person submitted to them, and endeavoured not to rescue himself, and the person who rescued him, did not know that he was illegally arrested; for since in the event it appears, that the persons slain were trespassers, covering their violence with a shew of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.

Sett. 55. As to the fourth instance of this kind, viz. Such killing as happens in the execution of an unlawful action, whereof the direct design was to escape from an arrest. It seems to be agreed, That whoever kills a sheriff, or any of his officers, in the lawful execution of a civil process, as on arresting a person upon a *capias*, &c. is guilty of murder.

Sett. 56. Neither is it any excuse to such a person that the process was erroneous, (for it is not void by being

O.B. 1784, 775.
Fost. 271, 309,
318.

1 Sid. 160,
Noy 50.

Plow. 100.

Kely. 60, 117.
Crom. 27.
Ld. Ray. 1296.

Holt 485.

But the principles upon which this case was decided, are very elegantly and warmly controverted by Mr. Justice Foster, p. 315, to 318.

2 Hale, c. 82.
Dill. c. 93.
1 Hale, 463.
Sum. 45.
Crom. 24.
Strange 499.
6 St. Tr. 195.
Foster 29, 135,
308.

9 Co. 66, 68.
C. Jac. 280, 486.

1 Hale, c. 457.
438, 462.
Fost. 317, 311,
312, 318.
B. 2. c. 13.
f. 28.
2 Hale, c. 85.
6 Co. 68, 69.

fo,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance;) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand, if he be a special one.

-C. Car. 372, 537.
1 Hale, 56, 457,
460.
1 Jon. 346.
1 Lev. 91.
12 Co. 49.
Jenck, 429. 4 Inst. 333.

Sec. 57. Yet the killing of an officer in some cases will be manslaughter only.—As, First, Where the warrant by which he acts gives him no authority to arrest the party; as where a bailiff arrests *J. S.* a baronet, who never was knighted, by force of a warrant to arrest *J. S.* knight.

6 Mod. 173.
Sum. 46.
Ld. Ray. 1028.
Foster 311, 319.
2 Roll. 137.
Palm. 52.
1 Hale 458.
5 Co. 93. 2 Hale 117, 470. Salk. 79.

Sec. 58. Secondly, Where a good warrant is executed in an unlawful manner; as if a bailiff be killed in breaking open a door or window to arrest a man; or perhaps if he arrest one on a *Sunday* since 29 *Car. 2. c. 7.* by which all such arrests are made unlawful.

Peace officers, having a *legal* warrant to arrest for a breach of the peace, may break open doors, after having given due notice and demanded admittance, Fost. 136. but they cannot justify breaking open *other* doors or windows to execute a civil suit, Fost. 319, 320. Cowp. 3. Therefore, where a man, who had been arrested, by the artful contrivance of an officer upon civil process, (that of the warrant having been filed up after it had been sealed) obliged the officer to decamp by snapping a pistol at him three times, but the officers returning to the house, accompanied by the plaintiff and the attorney; and all three attempting to force in, the man within fired a gun through the door and shot the attorney, it was ruled manslaughter only, 10 St. Tr. 462. See also the arguments in the London Magazine for August, 1759. Fost. 311, 312.

Vile Sup. c. 28.
f. 5.

Sec. 59. As to the fifth instance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, whereof the principal purpose was to usurp an illegal authority. It seems clear, That if persons take upon them to put others to death, either by virtue of a new commission wholly unknown to our laws, or by virtue of any known jurisdiction, which clearly extends not to cases of this nature; as if the court of Common Pleas cause a man to be executed for treason or felony; or the Court Martial, in time of peace, put a man to death by the martial law, both the judges and officers are guilty of murder.

Summary 46.

Douglas 200.

Sec. 60. But where persons act by virtue of a commission, which if it were strictly regular would undoubtedly give them full authority, but happens to be defective only in some point of form, it seems that they are no way criminal.

C. 29. f. 12.
3 Inst. 5.
Sum. 44.
O. B. 1785, No.
751.
12 Mod. 628.
Ld. Ray. 143.
Prin. P. L. 236.

Sec. 61. As to the sixth instance of this kind, *viz.* Such killing as happens in the execution of an unlawful action, where no mischief was intended at all. It is said, That if a person happen to occasion the death of another, inadvertently doing any idle wanton action, which cannot but be attended with the manifest danger of some other; as by riding with a horse known to be used to kick among a multitude of people, by which he means no more than to divert himself by putting them into a fright, he is guilty of murder.

Sec.

Sec. 62. Also it hath been anciently holden, That if a person not duly authorized to be a physician or furgeon, undertake a cure and the patient die under his hand, he is guilty of Felony; but inasmuch as the books wherein this opinion is holden, were written before the statute of 23 H. 8. which first excluded such felonious killing, as may be called wilful murder of malice prepense, from the benefit of clergy, it may be well questioned, whether such killing shall be said to be of malice prepense, within the intent of that statute; however it is certain highly rash and presumptuous for unskilful persons to undertake matters of this nature; and indeed the law cannot be well too severe in this case, in order to deter ignorant people from endeavouring to get a livelihood by such practice, which cannot be followed without the manifest hazard of the lives of those who have to do with them: But surely the charitable endeavours of those gentlemen who study to qualify themselves to give advice of this kind, in order to assist their poor neighbours, can by no means deserve so severe a construction from their happening to fall into some mistakes in their prescriptions, from which the most learned and experienced cannot always be secure.

S. P. C. 16.
Pulton 22.
Crom. 27.
43 Ed. 3. 33.
F. Cor. 163.
Britt. c. 5.
4 Inst. 251.

1 Hale 429, 430.

See Dalt. c. 93.
4 Comm. 197.

For other particulars relating to this head, see the second book.

chapter of principals and accessaries, in

CHAPTER THE THIRTY-SECOND.

OF PETIT - TREASON.

AT common law not only the offences specified in the twenty-fifth of Edward the Third, but many others also were esteemed petit treasons, which are not so at this day; as (a) piracy by a subject; (b) discovery of the king's counsel by one of the grand jury; (c) an attempt by a wife to kill her husband, &c.

3 Inst. 20, 21.

(a) 40 Aff. 35.
Inf. c. 37. f. 2.
(b) 27 Aff. 63.
3 Inst. 22.

Dalt. c. 91. (c) S. P. C. 10. See 1 Hale 377, to 382.

But by 25 Edw. 3. no offence shall be adjudged petit treason, except in the following instances: First, Where a servant kills his master; Secondly, Where a wife kills her husband; Thirdly, Where an ecclesiastical man, secular, or religious, kills his prelate to whom he owes obedience.

Sec. 2. And this statute hath been so strictly construed, that no other case whatsoever, which cannot be brought within the meaning of these words, however it may be in its own nature more heinous, shall, by parity of reason, be expounded to be within the equity of them; and therefore the murder of a father by a son shall not be punished as petit treason, unless the son may by a reasonable construction come under the word servant, serving the father for meat, drink,

Plew. 86.
3 Inst. 12. 81.
18. Elis. c. 1. 12.

Dalif. 14.
3 Inst. 20.
Sum. 24.
Dalt. c. 91.
Crom. 19.

1 Hale, 380
Lamb. 248.

cloaths, or wages, in which case he shall be indicted by the name of a servant. (1)

(1) "I am sorry," says an elegant writer upon criminal law, "that parricide is not comprehended within the class of petty treason, nor subjected by our laws, to any degree of exemplary notice." Reiterated experience hath given a melancholy refutation to Solon's idea, "that it is impossible to commit so unnatural a barbarity." Prin. of P. L. 243.

1 Hale, 380.
B. Tref. 8, 12.

Plow. 86.
19 H. 6. 47.
3 Inst. 20.
4 Co. 46.

Sec. 3. Yet the murder of a mistress, or of a master's wife, has been adjudged petit treason within this statute, for notwithstanding the person slain can in neither of these cases, in good grammar, come under the word master, yet they are clearly within the meaning thereof, being used here to signify any person to whom another stands related as a servant.

33 Aff. 7.
B. Cor. 116.
S. P. C. 10.
Plow. 260.
1 Co. 99.
Sum. 24.
3 Inst. 20.

Sec. 4. Also the murder of a person by one who was his servant, upon malice conceived during the service, though it be not within the express words, is within the meaning of them, inasmuch as it is but the execution of the treasonable intention of the party, while he was a servant.

Sum. 24.
3 Inst. 20, 21.
1 Hal. 79.
Dyer

Sec. 5. Also the procuring, aiding, or abetting, of any of these offences, is clearly punishable within the meaning of this act, in the same manner as it was before; for the plain intent of the statutes is only to restrain the judges from proceeding against other crimes, as petit treasons, but no way to alter the law as to these.

Sum. 24.
1 Hale 378, 38
Dal. 16.
Dent. C. 91.
Crom. 19, 20

Dyer 254.
B. Cor. 119.

40 Aff. 25.
Sum. 215.
3 Inst. 20, 21.
139.

Crom. 19.
Dy. 128, 332.
Moor 91.
Dal. 16.

Sec. 6. And therefore it seems agreed, That persons accused of petit treason shall be contrued to be either not guilty at all, or principal or accessory, according to the known rules of law in other cases, and from hence it follows, That if the fact appear to have been done upon a sudden falling out, or in the party's necessary self-defence, &c. it cannot be petit treason. For inasmuch as all petit treason implies murder, and is the highest degree thereof, wherever the circumstances do not make the offence murder, they cannot make it petit treason; and *vice versa*, generally wherever the circumstances are such as will make the killing of a stranger by a stranger murder, they make the killing of a husband, or master, &c. petit treason. Yet it hath been adjudged, that if a wife or servant procure a stranger to kill the husband, or master, in the absence of such wife, or servant, neither the procurer nor actor are guilty of petit treason, but of murder only; because it is an allowed maxim, *That the offence of an accessory can never be of a higher kind than that of the principal*; but it seems clear, That if the wife or servant be either actually present, when the crime is done, or present only in judgment of law, as being in the same house, but not in the same room, (in which case the hopes of their immediate assistance encourages and emboldens the murderer to commit the fact, which otherwise perhaps he would not have dared to do, and makes them guilty in the same degree, as if they

they had actually stood by with their swords drawn, ready to second the villainy,) such wife, or servant, being principal as much as the stranger, are guilty of petit treason, and the stranger of murder; but it is said, That if a wife procure a servant to kill the husband, both are guilty of petit treason: And even if a stranger procure a wife, or servant, to kill the husband, or master, it seems that he may be indicted as accessory to petit treason. (2)

B. 2. c. 29.
f. 89.
1 Hale, 382.
Dyer 332.
Crom. 41.
Dall. 16.

(2) A wife divorced *causa adulterii vel sevitie*, is still within this law, because the bond of matrimony is not thereby dissolved, and she may again lawfully cohabit with her husband. But a divorce *causa conjugunitatis vel pre contractus*, entirely dissolves the nuptial tie, and annihilates the very character of wife. Therefore, a wife *de facto* only, and not *de jure*, cannot commit this crime, for she has no lawful lord to whom she owes subjection and obedience. Neither can a husband be guilty of this crime by killing his wife *de jure*, for there is no reciprocity of obedience and subjection.

† Sect. 7. A clergyman living and beneficed in one diocese who kills the bishop or metropolitan of that diocese, or of the diocese where he may be beneficed by dispensation; or the bishop who ordained him, may be guilty of this offence; for a canonical obedience results both from institution and ordination. (3)

1 Hale, 373,
382.
4 Comm. 204.

(3) The law considers petty treason and murder as one offence, differing only in circumstance and degree: Foist. 327, and the principles that govern in the case of murder, are equally applicable to petty treason. 4 Comm. 204. An appeal of death will lie, and *Autrefois acquit*, or attain in murder is a good bar in petty treason and *e converso*. 2 Hale. 246, 252. 3 Inst. 213. It is included in a pardon under the name of murder. 1 Hale, 378. And the offender may be indicted either for petty treason, murder, or manslaughter, and tried and found guilty on such indictment, of either of those crimes respectively, according as the case may appear upon the evidence. 1 Hale, 378. Foist. 326.

But, if the prisoner be apprized of the real case, he ought to adapt the bill to the truth of the fact. Foist. 322, 326. For, though the offences are to most purposes considered as substantial the same, yet there is some difference with regard to the judgment, and a very material one with regard to the trial. Foist. 327. The punishment is, in a man, to be drawn and hanged, and in a woman, to be drawn and burned. 1 Hale, 382. 3 Inst. 311. And on the trial, the prisoner is entitled to a peremptory challenge of thirty-five. Foist. 327. Two witnesses also are required both on the indictment and at the trial. 1 Edw. c. 12. Foist. 327. And the 5 and 6. Hen. 6. c. 11. by general words extending to all treasons, requireth that the witnesses, if any, shall be examined in person upon the trial in open court. Depositions therefore taken before the coroner, or informations taken by a justice of peace, are not evidence whereon to ground a conviction of petit treason, if the party be living, though unable to travel, or kept out of the way by the prisoner, or his procurement. Foist. 337.

† Sect. 8. Principals in this offence were first debarred the benefit of clergy by 12 Hen. 7. c. 7. and accessories both before and after, by 4 & 5 Ph. & Ma. c. 4.

CHAPTER THE THIRTY-THIRD.

OF SIMPLE LARCENY.

AND now we are come to offences against the goods of another, which are generally called larcenies, from the Latin word *Latrocinium*, of which there are two kinds: First, Simple larceny; Secondly, Mix'd larceny.

Simple larceny is also of two kinds, First, Grand larceny; Secondly, Petit larceny.

SECT. 1. Simple grand larceny is a felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another, not from the person, nor out of his house, above the value of twelve pence.

Sum. 60.
Dalt. c. 101.
1 Hale 503, 504.
Foster 121.

For the better explication of which definition, I shall in order consider the several parts of it; as, First, What shall be said to be a felonious and fraudulent taking; Secondly, What shall be said to be a carrying away; Thirdly, By whom the offence may be committed; Fourthly, What are such goods the taking whereof may be felonious; Fifthly, How far such goods ought to belong to another; Sixthly, Of what value they must be.

SECT. 2. As to the first particular, viz. What shall be said to be a felonious and fraudulent taking? It is to be observed, That all felony includes trespass, and that every indictment of larceny must have the words *felonice cepit*, as well as *asportavit*; (a) from whence it follows, That if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away.

Kely. 24.
1. Cor. 45, 48,
58, 137, 160.
Sum. 61.
(d) If a horse be
stolen the indict-
ment should run
"cepit et aldux-
it." If a sheep,
&c. "cepit et
effugavit." 1 Hale 504. C. Cir. Com. 320.

SECT. 3. And from this ground it hath been holden, That one who finds such goods as I have lost, and converts them to his own use *animo furandi*, is no felon; and *a fortiori*, therefore, it must follow, That one who has the actual possession of my goods by my delivery, for a special purpose, as a carrier who receives them, in order to carry them to a certain place; or a taylor who has them in order to make me a suit of cloaths; or a friend who is intrusted with them to keep for my use, cannot be said to steal them, by embezzling of them afterwards.

3 Inst. 102, 103.
Sum. 61.
1 Hale, 504.
13 Ed. 4, 9, 10.
5. P. C. 25.

Vide sect. 6.

Sec. 4. And herein our law differs from the civil, which, agreeably to the *Mosaic* law, having no capital punishment for *bare* thefts, deals with offences of this kind as such, as in strict justice most certainly it may; but our law which punishes all theft with death, if the thing stolen be above the value of twelve pence, and with corporal punishment if under, rather chuses to deal with them as civil than criminal offences, perhaps for this reason, in the above mentioned case, concerning goods lost, because the party is not much aggrieved where nothing is taken but what he had lost before; and for this cause in the other cases, concerning the imbeziling of goods delivered to another by the owner, because the party being intrusted with the whole possession, it may be presumed that both the offender and his offence are known, and consequently the person injured is supposed to have a remedy by action against him, from which consideration some have made it part of the definition of larceny, that it be committed without the knowledge of the owner; and it seems rigorous to have recourse to severe laws, where probably more gentle ones will be effectual.

S. P. C. 25.
See Exod. 22.

Dalt. c. 101.
Braft. l. 3. 150.
Fleta, l. 1. 36.
2 Hale, 290.

Sec. 5. And agreeably hereto, it has been resolved, That even those who have the possession of goods by the delivery of the party, may be guilty of felony by taking away part thereof, with an intent to steal it; as if a carrier open a pack and take out part of the goods; or a weaver who has received silk to work; or a miller who has corn to grind, take out part with an intent to steal it; in which cases it may not only be said that such possession of a part distinct from the whole, was gained by wrong, and not delivered by the owner, but also that it was obtained basely, fraudulently, and clandestinely, in hopes to prevent its being discovered at all, or fixed upon any one, when discovered. (1)

1 Hale, 505.
13 E. 4. 9, 10.
S. P. C. 25.
Dalt. c. 102.
35.
1 R. Abr. 73.

(1) To constitute larceny the property must be taken from the possession of the owner; therefore, where A. intending to go a distant journey, hires a horse, fairly and *bona fide*, for that purpose, and evidences the truth of such intention, by actually proceeding on his way, and afterwards rides off with the horse, it is no theft; because the felonious design was hatched subsequent to the delivery, and the delivery having been obtained without fraud or design, the owner parted with his possession, as well as his property; O. B. 1784, p. 1294, and thereby gave to A. dominion over the horse, upon trust, that he would return him when the journey was performed. O. B. 1786, p. 333, 334.—But if the delivery of property be obtained with a preconcerted design to steal the thing delivered, although the owner, in this case, parts with the thing itself, he still retains, in law, the constructive possession of it; therefore, where a man, having feloniously obtained the delivery of a bill of exchange under the fraudulent and delusive pretence of discounting it, converted it to his own use; and it appearing upon the evidence that the owner never meant to part with the possession, it was held to be felony; O. B. 1784, p. 294. so also where a horse was obtained with the same design, upon pretence of trying its paces; O. B. 1779, p. 163. O. B. 1784, p. 293. So also, to obtain the delivery of money, with design feloniously to take it away, under the false pretence of having found a diamond ring of great value, has been determined by nine judges to be a taking from the possession of the owner, and consequently felony; O. B. 1785, p. 160. So also to obtain the delivery of goods under pretence of purchasing them, and then to run away with them; Ray. 276. And, in general, where the delivery of the property is made for a certain, special, and particular purpose, the possession is still supposed to reside, unparted with, in the first proprietor. Therefore, where a master delivers goods to his servant to carry to a customer, but instead of so doing he converts them, on his way, to his own use, it is a felonious taking; for the master had a right to countermand the delivery of them, and therefore the possession remained in him at the time of the conversion; O. B. 1782, No. 375. O. B. 1783, No. 28. So also, if a

watch maker steals a watch, delivered to him to clean; O. B. 1779, No. 83. Or if one steal cloas delivered for the purpose of being washed; O. B. 1758, No. 18. Or goods in a chest delivered, with the key, for safe custody; O. B. 1779, No. 83. Or guineas delivered for the purpose of being changed into half guineas; O. B. 1778, No. 52. Or a watch delivered for the purpose of being pawned; O. B. 1784, No. 613. In all these instances the goods taken have been thought to remain in the possession of the proprietor, and the taking of them away held to be felony.

3 H. 7. 12.
21 H. 7. 14.
B. 1. or. 48, 137.
S. P. C. 25.
Dalt. c. 102.
Moor. 246.
O. B. 1784 p.
202.
Pep. 84.
1 Hale 505, 667.

SECT. 6. Also it seems generally agreed, That one who has the bare charge, or the special use of goods, but not the possession of them; as a shepherd who looks after my sheep, or a butler, who takes care of my plate, or a servant who keeps the key to my chamber, or a guest who has a piece of plate set before him in an inn, may be guilty of felony, in fraudulently taking away the same; for in all these cases the offence may as properly come under the word *cepi*; the injury to the owner is as great, and the fraud as secret, and the villainy more base, than if it had been done by a stranger. (2)

(2) Therefore, if the clerk to a banker or merchant has the care of money, or if he has access to it for special and particular purposes, and is sent to the bag or drawer for money, for the purpose of paying a bill, or if he is sent for the purpose of bringing money generally out of that bag or drawer, and at the time he brings that money, he clandestinely and secretly takes out other money for his own use, he is as much guilty of a felony as if he had had no permission or access to it whatever. So, if a servant be sent to a library for one particular book and he takes another, or being sent for a hat, and sword, and he steals a cane; in all these cases it has been said the offenders are guilty of felony; for though the property is delivered, the possession of it remains in the true owner; O. B. 1784, p. 1295, 1304. So also where a person being left in an apartment, pawns the furniture or other property under his care, with a felonious design to steal it, it is felony; O. B. 1785, p. 717. O. B. 1786, p.

Summary 62.
3 Inst. 107.
B. Cor. 100.
S. P. C. 25.
O. B. 1786, p.
334.
1 Hale, 505.

SECT. 7. Also it seems clear, That if a carrier, after he has brought the goods to the place appointed, take them away again secretly *animo furandi*, he is guilty of felony, because the possession which he received from the owner being determined, his second taking is in all respects the same as if he were a mere stranger.

1 Hale, 507.
3 Inst. 107.
Sum. 63.
Kely. 43.
1 Sid. 254.
Raym. 276.

SECT. 8. And not only he who first lays his hands on my goods himself, but in many cases he who receives them from another, may be guilty of feloniously taking them; as if a person intending to steal my horse, take out a replevin, and thereby have the horse delivered to him by the sheriff; or if one intending to rifle my goods, gets possession from the sheriff, by virtue of a judgment obtained, without any the least colour or title, upon false affidavits, &c. in which cases the making use of legal process is so far from extenuating, that it highly aggravates the offence, by the abuse put on the law, in making it serve the purposes of oppression and injustice.

13 E. 4. 3.
Sum. 64, 69.
S. P. C. 61.
B. App. 344, 400.
B. Coram 71.

SECT. 9. Also he who steals my goods from J. S. who had stolen them before, may be indicted, or appealed, as having stolen them from me, because in judgment of law, the possession as well as property always continued in me. And for this cause, he who steals my goods in the county of B. and carries them to the county of C. may be indicted or appealed in the county of C. as well as that of B. because the possession still continuing

continuing in me, every moment's continuance of the trespass 4 H. 7. 5, 6. is as much a wrong to it, and may come under the word *capit.* 1 Hale, 507. as much as the first taking. Yet a pirate carrying the goods wherof he robbed me at sea, into any county, cannot be in- 3 Inst. 113. dicted for felony there, because the original taking was not such a felony wherof the common law takes consuance.

† But by 13 Geo. 3. c. 31. s. 4. "Any person having stolen, or otherwise feloniously taken money, cattle, goods, or other effects in either part of the United kingdom, who shall afterwards have the same, or any part thereof, in their possession in the other part of the United kingdom, may be indicted of larceny in that part where they are so found with the property as aforesaid; and by sect. 5. Receivers may be indicted in that part of the United kingdom where they shall receive, or have in their possession the property so stolen."

SECT. 10. It seems not to have been clearly settled before 3 E. 4. Will. & Mar. c. 9. whether a lodger, who stole the furniture of his lodgings, were indictable as a felon, inasmuch as he had a kind of special property in the goods, and was to pay the greater rent in consideration of them; but if it had appeared clearly, from the whole circumstance of the case, that the first intention of the party in coming to the house, was not to have the convenience of lodging in it, but only, under the colour thereof, to have the better opportunity of using it, and to elude the justice of the law, by endeavouring to keep out of the letter of it, by gaining a possession of the goods with the consent of the owner, I cannot see any good reason why such a person should not be esteemed as much a felon as a mere stranger, inasmuch as his whole design was to defraud the law, and the consent of the owner was grounded on a supposition of his coming as a lodger, and could never have been gained if the truth had appeared, which the party shall get no advantage by falsifying: And it brings a contempt upon the justice of the nation to suffer its laws to be evaded by such little contrivances: However this question is now settled by the said statute, which hath enacted and declared, "That if any person or persons shall take away with an intent to steal, imbezil or purloin any chattel, bedding or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, imbeziling, or purloining, shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in case of felony." (3)

Of larceny by breach of trust.

By 4. Geo. 3. c. 2. s. 57, house-holders must give an account of their lodgers on pain of 5l.

Kely. 24, 81.

Show. 50, 57.

For indictment on this statute, vide Cro. Cir. Cum. 339.

(3) A wife cannot be found guilty with her husband upon this statute, for she is under his coercion. O. B. 1783, No. 30. Nor without her husband, if it should appear that the lodgings were let to him. O. B. 1761, No. 17. Nor even if it should appear that the lodgings were let jointly to both the husband and wife, for it shall be construed to be the act of the husband only. O. B. 1758, No. 105. The offender must be a lodger at the time the larceny is committed. O. B. 1785, No. 74. The indictment also must set forth the name of the person by whom the lodgings were let. O. B. 1784, No. 747. And the property stolen must be such as may reasonably be construed the furniture of the sort of lodging taken.

SECT. 11. It is recited by 21 Hen. 8. c. 7. "That before the time of the said statute, divers, as well noblemen, as other the king's subjects, had, upon confidence and trust, delivered unto their servants their caskets, and other jewels, money, goods and chattels, safely to keep, to the use of the said masters or mistresses, and after such delivery the said servants had withdrawn themselves, and gone away from their said masters or mistresses, with the said caskets, jewels, money, goods and chattels, or part thereof, to the intent to steal the same, and defraud their said masters or mistresses thereof, and sometime being with their said masters or mistresses, had converted the said jewels, money, and other chattels, or part thereof, to their own use, which misbehaviour so done, was doubtful in the common law, whether it were felony or not; and by reason thereof the aforesaid servants had been in great boldness to commit such or the like offences." And thereupon it is enacted, "That all and singular such servants, (being of the age of eighteen years, and not apprentices) to whom any such caskets, jewels, money, goods or chattels, by his or their said masters or mistresses shall from thenceforth so be delivered to keep, that if any such servant or servants withdraw him or them from their said masters or mistresses, and go away with the said caskets, jewels, money, goods or chattels, or any part thereof, to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put, by his or their said masters or mistresses, or else being in the service of his said master or mistress, without assent or commandment of his master or mistress he imbeizil the same caskets, jewels, money, goods or chattels, or any part thereof, or otherwise convert the same to his own use, with like purpose to steal it, That if the said caskets, jewels, money, goods, or chattels, that any such servant shall so go away with, or which he shall imbeizil with purpose to steal it, as is aforesaid, be of the value of 40s. or above, That then the same false, fraudulent and untrue act and demeanour, from thenceforth, shall be deemed and adjudged felony, &c."

See 1 Hale, 667, 668.

Dalt. c. 102. Summary 63.

SECT. 12. In the construction of this statute the following opinions have been holden: First, That it extends only to such as were servants to the owner of the goods, both at the time when they were delivered, and also at the time when they were stolen.

Dyer 5. Sum. 62, 63. 3 Inst. 105. Dalt. c. 102.

SECT. 13. Secondly, That it is strictly confined to such goods as are delivered to keep, and therefore that a receiver, who having received his master's rents, runs away with them; or a servant, who being intrusted to sell goods, or to receive money due on a bond, sells the goods, &c. and departs with the money, is not within the statute; but that a servant, who receives

receives his master's goods from another servant to keep for the master, is as much guilty as if he had received them from the master's own hands, because such a delivery is looked upon as a delivery by the master.

Sec. 14. Thirdly, That it includes not the wasting or consuming of goods, howsoever wilful it may be; nor the taking away of an obligation, or any other *bona fide in aliena*. Summary 63.
Dalt. c. 102.
Dyer 5.

Sec. 15. Fourthly, That it extends not to the taking of such things whereof the actual property is not in the master at the time. Therefore, if a servant having money, or corn, &c. delivered to him, melt down the money of his own head, without the command of his master, into a piece of plate, or turn the corn into malt, and then run away with them, he is not within the statute; because the property of these things is so far changed, by altering them in such a manner, that they cannot be known again, and the master cannot afterwards take them without a trespass. But it is agreed, That if a servant make a suit of cloaths of cloth, or a pair of shoes of leather, delivered to him by the master, and then run away with them, he is within the statute; because the property is no way altered. And even in the first case, whether the *very taking* of the plate or malt, be within the statute or not, yet I can see no reason, why the whole act of the servant taken together, should not be looked upon as a conversion of the master's goods to his own use, with an intent to steal them, which brings it within the express letter of the statute: It has been resolved, That a servant who changes his master's money from silver to gold, and then runs away with it, &c. is within the statute; and I can see no good distinction between that and the present case. 5 H. 7. 16.
Crom. 50.
Dalt. c. 102.

Sec. 16. The benefit of clergy was taken away from all felonies within this statute, by 27 Hen. 8. c. 17. and restored by 1 Edw. 6. c. 12.—But it is enacted by 12 Ann. Stat. 1. c. 7. “that whosoever shall feloniously steal to the value of 40 s. or more, being in any dwelling-house, or out-house, thereto belonging, or shall aid or assist to commit any such offence, shall be absolutely debarred of the benefit of clergy. —But this act shall not extend to apprentices under the age of fifteen years, who shall rob their masters as aforesaid.” See Crom. 50.
Dalt. c. 102.

† *Sec. 17.* To the two foregoing larcenies, *by breach of trust*, by lodgers and *menial* servants, the legislature has added two others, *viz.* By officers or servants employed to transact the business of the bank of England; and by officers, or servants employed in the post-office. As to servants employed by the BANK OF ENGLAND, it is enacted by 15 Geo. 2. c. 13. s. 12. “That if any officer or servant of the bank of England, being intrusted with any note, bill, dividend warrant, bond, deed, or any security, money, or other effects belonging to the said Company, or having any bill, dividend warrant, bond, deed, or any security or effects of any other person lodged or deposited.” Vide the law of larceny is to the servants of private Bankers explained in Sessions paper O. E. n. 1294. and ante p. 136.

"deposited with the said company, or with him as an officer or servant of the said company, shall secrete, imbezzle, or run away with the same, or with any part thereof he shall suffer death without benefit of clergy."

† As to servants employed by the Post-Office, it is enacted by 5 Geo. 3. c. 25. s. 17. and 7 Geo. 3. c. 59. "That if any deputy, clerk, agent, letter-carrier, post-boy or rider, or any other officer or person whatsoever employed in receiving, stamping, sorting, charging, carrying, conveying or delivering letters or packets, or in any other business relating to the post office, shall secrete, embezzle, or destroy any letter, packet or bag of letters, which he shall be intrusted with, or which shall have come to his possession, containing any bank note, bank post bill, bill of exchange, exchequer bill, South Sea, or East India bond, dividend warrant, navy or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuity or dividends, or for selling stock in the funds, or belonging to any company, society or corporation, or of the Bank, South Sea, East India or any other company or society or corporation, American provincial bill of credit, goldsmiths or bankers letter of credit, or note for or relating to the payment of money or other bond or warrant, draught, bill, or promissory note whatsoever for the payment of the money, or shall steal and take any of the same out of any letter or packet that shall come to his possession, he shall suffer death without clergy." (4)

Vide the trial of John Mills O. B. 1785, No. 253, convicted upon this statute.

(4) In an indictment on this statute, the offender was charged in the first and third counts, as, "A clerk employed in *charging and sorting* letters. &c." In the second and fourth counts, as, "A person employed in the business relating to the general post-office." It appeared in evidence that he was only a *sorter* and not a *charger* of letters; and the jury, therefore, by the direction of the Court, found a verdict upon the second and fourth counts only. In arrest of judgment it was moved, that the jury having acquitted him on the counts which charged him as "a sorter and charger," and as he did not appear to be "a person employed by the post-office in any other business but that of sorting, which is one of the employments particularly specified in the statute, he could not be convicted, and eleven judges unanimously agreed that judgment should be arrested for the cause above alleged; but they inclined to think the jury might have convicted the prisoner on the first and third counts, by a special finding that he was a sorter only. Rex. v. Shaw. 2 Black. 789.

† By Jac. 1. c. 7. and 17 Geo. 3. c. 56. "Persons employed in the hat, woollen, linen, suttian, cotton, iron, leather, fur, hemp, flax, mohair, silk, or dying manufacture, who shall embezzle or clandestinely dye any of the materials with which they are intrusted, and any person who shall knowingly buy, sell, pawn, or dispose of the same, are liable to be punished by fine, whipping, and imprisonment."

Sec. 18. As to the second particular, viz. What shall be said to be such a carrying away of the thing stolen, as will bring the case within the word *aspersavit*; which is necessary in every indictment of larceny; It seems that any the least removing

removing of the thing taken from the place where it was before, is sufficient for this purpose, though it be not quite carried off; and upon this ground the guest, who, having taken off the sheets from his bed, with an intent to steal them, carried them into the hall, and was apprehended before he could get out of the house, was adjudged guilty of larceny. So also was he who having taken a horse in a close with an intent to steal him, was apprehended before he could get him out of the close: Neither is he less guilty who pulls off the wool from another's sheep, or (a) strips their skins, with an intent to steal them; or he who intended to steal plate takes it out of a trunk wherein it was, and lays it on the floor, and is surprized before he can carry it off. (5)

7 Aff. 39.
S. P. C. 26.

B. Cor. 107.
3 Inst. 109.
1 Hale 508.
Dalt. 21.
Crom. 36.
O. B. Seff. 1784.
No. 537.
Dalt. p. 501.
Kely. 31.

(a) Rex. v. Martyn, Lent Ass. for Northampton, 1777.

(5) A man was detected in taking the contents of a bale of goods in a waggon. It appeared that the bale laid horizontally, and that he had set it on its end; but as it had not been removed from the floor, this was held, upon a case reserved, not to be a sufficient carrying away. But where a man, with a felonious intention, had removed goods from the head to the tail of a waggon, it was held a sufficient removal to constitute a carrying away. O. B. 1784, p. 734. So a diamond ear-ring snatched from a lady's ear, but lodging in the curls of her hair, and not taken by the thief, was held to be a sufficient asportation. O. B. 1784, No. 537.

Seff. 19. As to the third particular, viz. By whom larceny may be committed,—It is certain that a feme covert may be guilty thereof by stealing the goods of a stranger, but not by stealing her husband's, because a husband and wife are considered but as one person in law; and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them; for which cause, even a stranger cannot commit larceny in taking the goods of the husband by the delivery of his wife; as he may by taking away the wife by force and against her will, together with the goods of the husband.

Sap. c. 1.
1 Hale 514, 515.
516, 617, 638.
Pult. 127.
Sum. 65.
B. Cor. 14. 75.
Dalt. c. 104.
13 Aff. 5.
18 Fe. 3. 32.
S. P. C. 94.
Crom. 35.
See Proverbs c. 6.
v. 30.
Græde Jure, b. 2.
c. 2. f. 6, 7.
Mirr. c. 4.

Puffend. b. 2. c. 6. Britton, c. 10.

Seff. 20. It is said to be no felony for one reduced to extreme necessity, to take so much of another's victuals as will save him from starving; but if such his necessity be owing to his unthriftiness, surely it is far from being any excuse. (6)

(6) A judge ought to be tender in such cases, and use much discretion and moderation. 1 Hale 565. But it seems to be an unwarranted doctrine, borrowed from the notions of some civilians; at least it is now antiquated, the law of England admitting no such excuse at present. 4 Comm. 31. 1 Hale, 54.

Seff. 21. As to the fourth particular, viz. What are such goods, the stealing whereof may amount to felony, the following particulars are to be observed.—First, they ought to be no way annexed to the freehold. And therefore it is no larceny, but a bare trespass, to steal corn or grass, growing, or apples on a tree, or lead on a church or house, but it is larceny to take them being severed from the freehold, whether by the owner, or even by the thief himself, if he sever them at one time, and then come again at another time and take them.—

And

1 Hale, 5-9,
512.
12 Aff. 32.
B. Cor. 76.
1 Mod. 89.
Sum. 67.
Allen 84.
3 Inst. 109.
2 Keb. 875.

1 Vent. 187.
Crom. 37.
18 H. 8. 2.
S. P. C. 25.
Strange 1137.
2 Comm. 16.

And the general reason of this distinction (7) between chattels fixed to a freehold and those lying loose, perhaps may be this, because the former, not being to be removed without trouble and difficulty, are not so liable to be stolen, and therefore need not to be secured by so severe laws as the other require.

(7) For an explanation of the principle upon which this distinction is founded, vide Comm. 233. 2 Bac. Abr. 470.—But many of the descriptions of property which come within this notion of an adherence to the freehold, being thereby placed in a situation extremely precarious and unprotected, the legislature has from time to time imposed various penalties upon the stealing, injuring, or destroying of them. For an account of which vide appendix the first, chapter fifty-eight, under the title “Offences to property adherent to the freehold.”

Sum. 66, 67.
Strange 1133.
Sess. Caf. 378.
3 Inst. 109.

B. Cor. 155.
S. P. C. 25.
Crom. 27.
3 Rep. 63.
4 Comm. 234.

Str. 1136.

Sec. 22. Secondly, They ought to have some worth in themselves, and not to derive their whole value from the relation they bear to some other thing, which cannot be stolen, as paper or parchment on which are written assurances concerning lands, or obligations, or covenants, or other securities for a debt or other *chase* in action. And the reason wherefore there can be no felony in taking away any such thing seems to be, because, generally speaking, they being of no manner of use to any but the owner, are not supposed to be so much in danger of being stolen, and therefore need not to be provided for in so strict a manner as those things which are of a known price, and every body's money; and for the like reason it is no felony to take away a villein, or an infant in ward, &c.

Made perpetual
by 9 Geo. 2.
c. 18.

† But it is now enacted by 2 Geo. 2. c. 25. § 3. “That whoever shall steal or take by robbery, any exchequer orders or tallies, or other orders intitling any other person to any annuity or share in any parliamentary fund, or any exchequer bills, bank notes, South Sea bonds, East-India bonds, dividend warrants of the Bank, South Sea company, East-India company, or any other company, society or corporation; bills of exchange, navy bills or debentures, goldsmiths notes for the payment of money, or other bonds or warrants, bills, or promissory notes for the payment of any money being the property of any other person or of any corporation, notwithstanding any of the said particulars are termed in law a *chase* in action, shall be deemed guilty of felony of the same nature and in the same degree, and with or without the benefit of clergy, in the same manner as it would have been, if the offender had stolen or taken by robbery, any other goods of like value with the money due on such orders, tallies, bills, bonds, warrants, debentures or notes, or secured thereby, and remaining unsatisfied, and such offender shall suffer such punishment as if he had stolen other goods of the like value, with the monies due on such orders, tallies, bonds, bills, warrants, debentures or notes respectively, or secured thereby, and remaining unsatisfied.”

Vide O.B. 1785.
No. 253.

† It is also further enacted by 5 Geo. 3. c. 25. § 17. and by 7 Geo. 3. c. 50. § 2. “That whoever shall rob any mail in
“ which

" which letters are sent or conveyed by the post, of any letter, packet, or bag of letters, or shall steal and take from any such mail, or from any bag of letters sent or conveyed by the post, or from or out of any post-office, or house or place for the receipt or delivery of letters or packets sent, or to be sent by the post, any letter or packet, although such robbery, stealing, or taking shall not appear or be proved to be a taking from the person, or upon the king's highway, or to be a robbery committed in any dwelling house or any coach house, stable, barn, or any out-house belonging to a dwelling house; and although it should not appear that any persons were put in fear by such robbery, stealing, or taking, yet such offenders shall be deemed guilty of felony, and suffer death without the benefit of clergy."

Sec. 23. Thirdly, They ought not to be things of a base nature, as dogs, cats, bears, foxes, monkeys, ferrets, and the like, which, howsoever they may be valued by the owner, shall never be so highly regarded by the law, that for their sakes a man shall die; as he may for stealing a hawk, known by him to be reclaimed, not only by force of the statute of 37 *Edw. 3.* 19. but also at common law, in respect of that very high value which was formerly set upon that bird,

Sum. 66.
3 *Inst. 109.*
7 *Ca. 18.*
3 *H. 8. 3.*
Crom. 36.
Dalt. c. 103.
2 *Comm. 393.*
1 *Hale 512.*

† But it is recited by the 10 *Geo. 3. c. 18.* " That the practice of stealing dogs hath of late years greatly increased," and it is therefore enacted, " That if any person shall steal any dog or dogs of any kind or sort whatsoever from the owner thereof, or from any person entrusted by the owner therewith, or shall knowingly sell, buy, receive, harbour, keep or detain any such dog or dogs, on conviction by one witness, or on confession, before two justices, they shall forfeit, for the first offence, not exceeding 30*l.* nor less than 20*l.* together with the charges previous to and attending such conviction; on default to be committed to the house of correction for not more than twelve, nor less than six months, unless the penalty be sooner paid." For the second offence, not exceeding 50*l.* nor less than 30*l.* and from twelve to eighteen months imprisonment, &c. One justice, on information, may grant a warrant to search, &c. and if any such dog, or the skin of such dog, be found, the possessor, if privy, &c. is liable to the penalties aforesaid. On fourteen days notice, and entering into a recognizance, persons aggrieved may appeal to the Quarter Sessions, but no certiorari shall be allowed. (8)

(8) Mr. Burn has pointed out several inaccuracies in this statute, and doubts very much whether from the special wording of it, it is penal to steal a bitch. 1 *Vol. 497.* It is also said, that the particular sort of dog stolen must be described. *Adding. P. S. 221.*

Sec. 24. As to the fifth particular, viz. How far the goods taken away ought to belong to another. It seems agreed, That the taking of goods whereof no one had a property, at the

See 1 Hale 512
to 515.
B. Cor. 190.

Sum. 67.
22 Aff. 99.
3 Inst. 108, 109.
S. P. C. 25.
Dalt. c. 103.
F. Cor. 265.
Owen. 20.

the time, cannot be felony; and therefore, That he who takes away treasure-trove, or a wreck, (9) waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony, and shall be only punished by fine, &c.

(9) For offences by statute in taking treasure-trove, or robbing a wreck, vide appendix 2. c. 58.

Sec. 25. Neither shall he who takes a fish in a river or other great water, wherein they are at their natural liberty, be guilty of felony, as he may be who takes them out of a trunk or pond, &c. (10)
(10) For the penalties imposed by statute on stealing or destroying fish, vide c. 58, appendix the third. Felt. 366. 1 Hale 511.

Sec. 26. Upon the like ground it seems clear, That a man cannot commit felony by taking deer, hares, or conies, in a forest, chase, or warren, or old pigeons being out of the house, &c. But it is agreed, That one may commit larceny in taking such or any other creatures *feræ naturæ*, if they be fit for food, and reduced to tameness, and known by him to be so; and it seems the most plausible opinion, That it is felony to steal wild pigeons in a dove-house shut up, or hares or deer (11) in a house, or even in a park, inclosed in such a manner that the owner may take them whenever he pleases, without the least danger of their escaping, in which case they are as much in his power as fish in a pond, or young pigeons, or hawks in a nest, &c. in taking of which, for the like reason, it seems to be agreed, that felony may be committed.
(11) For the offences created by statute in taking or annoying deer, and hares, vide post, chap. 49 title "offences by hunters."

Sec. 27. Also it seems clear, That one may commit felony by taking away swans marked or pinioned, or those which are unmarked, if they be kept in a pond or private river; neither do I see why it is not as much felony to steal the eggs of such swans or hawks, as it is to steal their young ones, unless it be because 11 Hen. 7. c. 17. has appointed a less punishment for this offence.
Summary 68.
1 Hale 511.
7 Co. 17, 18.
Dalt. c. 103.
3 Inst. 98, 109.
By 31 Hen. 8. c. 12. it is felony to take hawks eggs out of any nests in the king's lands. This is repeated by the general words of 1 Mary. c. 1.

Sec. 28. However, there is no doubt but that the taking of domestick beasts, as horses, mares, colts, &c. or of any creatures whatsoever, which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, turkeys, peacocks, or their eggs, or young ones, may be felony.

Sec. 29. Also it is said, That there may be felony in taking goods the owner whereof is unknown, in which case the king shall have the goods, and the offender shall be indicted for taking *bona cujusdam hominis ignoti*. And it seems, That in some cases the law will rather feign a property, where in strictness there is none, than suffer an offender to escape.
And

1 Hale.
S. P. C. 29, 36.
Dalt. 99.
Dalt. c. 103.
Sum. 67.
B. 2. c. 31. f. 78.

And therefore it is said, That he who takes away the goods of a chapel, or abbey, in time of vacation, may be indicted, in the first case, for stealing *bona capelle*, being in the custody of such and such; and in the second, for stealing *bona domus & ecclesie*, &c. and *a fortiori*, therefore it follows, That he who steals goods belonging to a parish church, may be indicted for stealing *bona parochianorum*. And it hath been adjudged, That he who takes off a shroud (a) from a dead corpse, may be indicted as having stolen it from him who was the owner thereof when it was put on; for a dead man can have no property.

7 Ed. 4. 14, 29.
9. R. C. 95.
Dalt. c. 103.
3 Inst. 310.
B. Indict. 33.
C. Edit. 124, 179.
1 Hale 518.
(a) 3. Inst. 310.
12 Co. 113.
Dalt. c. 193.
1 Hale 515.
It is said, a Hale
290. and 3 Inst.
249. that a pro-
perty must be
of not guilty.

proved in somebody at the trial, or it shall be presumed in the prisoner from his plea, Sed vide O. B. 1785. p. 782, and Appendix 2nd, Sect. 17. in notis.

SECT. 30. And there is a special case, wherein it is said, That a man may commit larceny by taking of things, whereof the absolute property is in himself, as if A. (b) deliver goods to B. being a taylor or carrier, &c. and afterwards, with an intent to make him answer for them, fraudulently and secretly take them away; for B. had a special kind of property in the goods so delivered to him, in respect whereof, if a stranger (c) had stolen them, he might have been indicted generally as having stolen B's goods, and the injury is altogether as great, and the fraud as base, where they are taken away by the very owner.

(b) 7 H. 6. 43.
5 H. 7. 18.
B. Cor. 45. 160.
C. Edit. 536.
S. P. C. 26. 3 Inst.
110. Dalt. c.
103. (c) Sum.
c. 67.
Kelw. 70. O.
B. 1785. 239.

SECT. 31. As to the sixth point, viz. of what value the goods stolen must be; if they be but of the value of 12d. or under, the offence can be but petit larceny.

22 Aff. 39.
1 Hale C. 530.
B. Cor. 84. 85.
S. P. C. 24.
2 Roll. 78. Dalt.
12. 3 Inst. 33.

c. 101. 2 Inst. 189. Kely. 68. Sum. 69, 70. 4 Com. 238. 1 Hale

SECT. 32. Yet if two persons, or more, together, steal goods above the value of twelve pence, every one of them is guilty of grand larceny, for each person is as much an offender as if he had been alone.

S. P. C. 24.
Dalt. c. 101.
Sum. 70. Crom.
35. Pinn. P. L.
292.

SECT. 33. Also it seems the current opinion of all the old books, That if one at several times steal several parcels of goods, each under the value of twelve pence, but amounting in the whole to more, from the same person, and be found guilty thereof on the same indictment, he shall have judgment of death as for grand larceny; but this severity is seldom practised. (12)

S. P. C. 24.
1 Hale 512.
Crom. 36.
Dalt. c. 101.
Summary 70.
2 Keb. 719

(12) The value of the property stolen, must not only be, in the whole, of such an amount as the law requires to constitute a capital offence; but the stealing must be to that amount at one and the same particular time. For the law will not permit things stolen at different times, which are, in fact, different acts of stealing, to be added together; and as no number of petit larcenies will amount to a grand larceny, so no number of grand larcenies will amount to a capital offence. O. B. 1784. p. 206.

In what cases simple larceny is excluded from the benefit of the clergy will be shewn hereafter in the second book, in the chapter concerning clergy. (13).

(13) In horse-stealing, principal and accessory, 1 Ed. 4. c. 12. 2. & 3 Ed. 6. c. 33. 31 Eliz. c. 12. Stealing woollens from the tenters, 22 Car. 2. c. 5. 15 Geo. 2. c. 27. or from the loom, 12 Geo. 1. c. 34. Linen from the bleachers, 4 Geo. 2. c. 16. 28 Geo. 2. c. 27. but the judge may transport for 14 years. Cattle, 14 Geo. 2. c. 6. 15 Geo. 2. c. 34. On navigable rivers above 40s. 24 Geo. 2. c. 45. From vessels wrecked or in distress, 12 Ann. c. 18. 26 Geo. 2. c. 19. Letters by post, 7 Geo. 3. c. 50. Deer, hare, and conies, and fish, being armed and disguised, 9 Geo. 1. c. 22. Privately from the person above 12d. 8 Eliz. c. 4. women. 3 Hen. 7. c. 2. 39 Eliz. c. 9. Seignioring, embesiling, or destroying bank notes, 15 Geo. 2. c. 13. 31 Geo. 2. c. 42. Blackhead, 25 Geo. 2. c. 10. Naval stores. 22 Car. 2. c. 5. Vide Ante, p. 75. f. 18. Stealing from booth or tent, 5 and 6 Edw. 6. c. 9.

Summary 69.
1 Hale 503.

Sett. 34. And now we are come to petit larceny, which seems to agree with grand larceny in all the particulars above-mentioned, except only the value of the goods; so that wherever an offence would amount to grand larceny, if the thing stolen were above the value of twelve pence, it is petit larceny, if it be but of that value, or under.

Foster 73.

B. Cor. 84.
184. S. P. C. 24.
Dalt. c. 101.
Crom. 26.
Hetley 66.
7 H. 8. 23.

Sett. 35. And if one be indicted for stealing goods to the value of ten shillings, and the jury find specially that he is guilty, but that the goods are worth but ten pence, he shall not have judgment of death, but only as for petit larceny.

B. Cor. 2. 219.
1 Hale 530.
3 Inst. 218.
App. 72. 143.
Summary 70.
Con. S. P. C. 24.
Dalt. c. 101.

Sett. 36. It seems that all petit larceny is felony, and consequently requires the word *felonice*, in an indictment for it. Yet it is certain, That it is not punished with the loss of life, or lands, but only with the forfeiture of goods and chattels, and whipping, or other corporal punishment.

Vide, also, 16
Geo. 2. c. 15.
8 Geo. 3. c. 15.
19 Geo. 3. c. 74.
24 Geo. 3. c. 56.
respecting the
transportation of
offenders. B 2.
c. 33. f. 135. &c.

Sett. 37. † But it is enacted by 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. "That where any person or persons shall be convicted of grand or petit larceny, &c. who by the law shall be intitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, it shall and may be lawful for the court before whom they are convicted, or any court held, at the same or any other place, with the like authority, if they think fit, to order such offenders to be transported for the space of seven years."

N. B. There are no accessories in petit larceny; therefore if two be indicted, one for privately stealing from the person a handkerchief to the value of 12d. and another for receiving it, and the principal be found guilty value 12d. only, the accessory ought to be discharged. Foster 73.

CHAPTER THE THIRTY-FOURTH. OF ROBBERY.

MIXT or complicated larceny is such as hath a farther degree of guilt in it, as being a taking from the Person of a man, or from his House. Prin. P. L. 287.

Larceny from the person of a man either puts him in fear, and then it is called robbery; or does not put him in fear, and then it is called barely, Larceny from the person.

ROBBERY is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear. Summary 71.
3 Inst. 68.
1 Hale 531.

In the explication whereof, I shall consider the following particulars:—First, What taking away will satisfy the word *cepit* in an indictment for this offence. Secondly, What shall be said to be a taking away from the person. Thirdly, What kind of taking shall be said to be violent. Fourthly, In what respects robbery differs from other larcenies.

Sect. 1. As to the first point, viz. What taking away will satisfy the word *cepit* in an indictment for robbery; it seems clear, That he who receives my money by my delivery, either whilst I am under the terror of his assault, or afterwards while I think myself bound in conscience to give it to him by an oath to that purpose, which in my fear I was compelled by him to take, may in the eye of the law, as properly be said to take it from me, as he who actually takes it out of my pocket with his own hands. Summary 72.
44 E. 3. 14.
4 M. 4. 3.
Dalt. c. 100.
S. P. C. 27.
Crompton 34.
3 Inst. 68.
F. Cor. 464.
O. B. 1784.
P. 296.

Sect. 2. Neither can he who has once actually completed the offence, by taking my goods in such a manner into his possession, afterwards purge it by any re-delivery. † The outrage offered to the rights of society doth not vary in its nature, because ineffectual in its consequences (a). Therefore where a robber, having taken a purse, returned it again, saying, “If you value your purse, take it and give me the contents;” but was seized before the money was re-delivered, he was found guilty (b), for the continuance of the property in the possession of the robber is not required by law (c). 3 Inst. 60.
Summary 70.
(a) Prin. P. L. 286.
(b) O. B. 1781.
No. 1.
(c) 3 Inst. 69.

Sect. 3. But he who only attacks me in order to rob me, but does not take my goods into his possession, though he go so far S. P. C. 27.
Crompt. 34.
3 Inst. 69.
Dalt. c. 100.
Sum. 71. 72.
1 Hale 532.

far as to cut off the girdle of my purse, by reason whereof it falls to the ground, is not guilty of robbery; but highly punishable at the common law by fine and imprisonment, &c. for, so enormous a breach of the peace.—† This punishment however not proving sufficient to deter offenders, it is made a felony by 7 Geo. 2. c. 21. “to assault another with an intention to rob him,” for which I shall refer to Appendix the fourteenth (a) And to crush the offence in its earliest stage, it is enacted by 23 Geo. 3. c. 88, “that whoever shall be apprehended, and any pistol, hanger, cutlass, bludgeon, or other offensive weapon shall be found upon him, with intent feloniously to assault any person, he shall be deemed and punished as a rogue and vagabond.” (b)

(a) Page 250.
251.

(b) Vide 17 G.
2. c. 5. page
570.

1 Hale 533.
534. 537.
1 And. 116.
Purley's case.
Crom. 341.
Dalt. c. 100.
Summary 72.
B. 2. c. 29.
1. 8.

Sec. 4. Yet in some cases a man may be said to rob me, where in truth he never actually had any of my goods in his possession; as where I am robbed by several of one gang, and one of them only takes my money, in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enterprise: Nay though they miss of the first, intended prize, and one of them afterwards ride from the rest and rob a third person in the same highway, without their knowledge, out of their view, and then return to them, all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing.

S. P. C. 27.
Crom 34. 35.
Dalt. c. 100.
5 Inst. 69.
Summary 73.
1 Hale 533.
Styles 156.
Salk. 613.
Barth. 145.
B. R. H. 107.
Strange 1015.
Douglas 197.
Comyns 478.

Sec. 5. As to the second point, viz. What shall be said to be a taking away from the person. Not only the taking away a horse from a man whereon he is actually riding, or money out of his pocket, but also the taking of any thing from him openly and before his face, which is under his immediate and personal care and protection, may properly enough be said to be a taking from the person. And therefore he who having first assaulted me takes away my horse standing by me, or having put me in fear, drives my cattle in my presence out of my pasture, or takes up purse which in my fright I cast into a bush, or my hat which fell from my head, or robs my servant of my money before my face, may be indicted as having taken such things from my person. (1)

(1) Fear is the distinguishing ingredient between robbery and other larcenies. 3 Inst. 68. Therefore where a thief clandestinely stole a purse; and, on its being discovered in his custody, denounced vengeance against the party if he spoke of it, and then rode away; it was held to be simple larceny only, and not robbery; because the fear, excited by the menaces of the thief, was subsequent to the act of taking the purse. 2 Roll. 244. 1 Hale 535. So where several men find another apparently intoxicated, and swearing he shall go home, they drag, abuse, kick him, and clandestinely take his money, this is no robbery; for no demand is made of money, nor any fear excited for the purpose of obtaining it. Q. B. 1:34. 3 Inst. 797.

Sec. 6.

Sec. 6. As to the third point, viz. What kind of taking shall be said to be violent. Wherever a person assaults another with such circumstances of terror as put him into fear, and causes him by reason of such fear to part with his money, the taking thereof is adjudged robbery, whether there were any weapon drawn or not, or whether the person assaulted delivered his money upon the other's command, or afterwards gave it him upon his ceasing to use force, and begging an alms; for he was put into fear by his assault, and gives him his money to get rid of him: (4)

Hale 533, 534
Sum. 71, 72.

Crom. 34.
Dalt. c. 100.
O. B. 1784.
p. 296.

(4) But it is not necessary that the fact of actual fear should either be laid in the indictment, or be proved upon the trial. It is sufficient if the offence be charged to be done *violenter et contra voluntatem*. And if it appear upon the evidence to have been attended with those circumstances of violence or terror, which in common experience are likely to induce a man to part with his property against his consent, either for the safety of his person, or for the preservation of his character and good name, it will amount to a robbery. Foster 128. 4 Comm. 242. Donally's case. O. B. 1778. p. 197. O. B. 1784. p. 71. 296. 873.—Accordingly, to snatch a basket of linen suddenly from the head of another. O. B. 1782. No. 483. *sed vide contra*. O. B. 1784. p. 71. or to pull an earring from the ear of a lady; O. B. 1784. No. 662. or if an officer seditiously take money from a prisoner not to take her to goal, under colour of authority, &c. O. B. 1784. p. 295. Ray. 297. Dalt. 489. without in either case having made any express demand, have been ruled sufficient acts of violence to constitute the crime of robbery. Prin. P. L. 286.—And to obtain property, by threatening to accuse another of having been guilty of an unnatural crime, has been held upon the solemn opinion of all the judges, to be an act sufficient to raise, in the mind of the party menaced, such a terror and apprehension of mischief as to constitute the offence by putting in fear; O. B. 1784. p. 206. O. B. 1786. p. 322. for the law in *odium spoliatoris* will presume fear where there appears to be so just a ground for it. Foster 129. Prin. P. L. 287. Antic. Sect. 1.

Sec. 7. And some have gone so far as to hold, That if a man, meeting another going with his goods to market in order to sell them, compel him to sell them to him against his will, he is guilty of robbery, though he give for them more than they are worth: But perhaps this opinion is too severe, because the grievance to the party seems rather to proceed from the perverseness of his humour, than from any real injury done to him; and there seems to be no such enormity in the intention of the wrong-doer, as is implied in the notion of felony.

Crom. 34, 35.
Dalt. c. 100.

Sec. 8. However it is certain, That the claim of property, in the thing taken away, without any colour, is no manner of excuse.

1 Hale 509.
Summary 62.

Sec. 9. As to the fourth point, viz. In what respects robbery differs from other larcenies. — First, No other larceny shall have judgment of death, unless the thing stolen be above the value of twelve pence; but robbery shall have such judgment, how small soever the value may be of the thing taken away.

S. P. C. 27.
Crom. 33.
Dalt. c. 100.
Summary 74.

Sec. 10. Secondly, Other larcenies whether from the person or not, shall not be supposed to be done with violence or terror, but robbery is always laid as done on an assault with violence, and putting the party in fear, (a) which is properly thus

3 Inst. 68.
Kellogg 70.

(a) Vide Note
Sec. 6.

expressed in an indictment, *a persona J. S. violenter, & felonice cepit & apprehendit in magnum praedicti J. S. terrorem.*

SECT. 11. Thirdly, But they all agree in this, That the offenders had the benefit of the clergy at the common law. But many of them are at this day excluded in many cases by statute; for which see the chapter in the second book concerning clergy. (5)

(5) Principals and accessories before the fact, in this species of larceny, are debarred of clergy by 23 Hen. 8. c. 1. and accessories after, by 4 Phil. & M. c. 4. If committed in or near about the highways. Moor, 16. 1 Hale, 535. But by 3 & 4 Will. & M. c. 9. it is ousted of clergy generally, 4 Comm. 243. The words of the 23 Hen. 8. however, are pursued in indictments for this offence. By 4 Will. & Mar. c. 8. a reward of 40*l.* is given on conviction of any robbery, committed in or upon any highway, passage, field, or open place: And by 6 Geo. 1. c. 23. §. 8. the streets of London, Westminster, and other places, are deemed highways within the meaning of 4 Will. & Mar. c. 8.—For the reward of ten pounds and proceedings against the hundred, see 8 Geo. 2. c. 16. 22 Geo. 2. c. 24.

CHAPTER THE THIRTY-FIFTH.

OF LARCENY FROM THE PERSON.

Dyer, 224.
2 Roll. 154.
Crom. :
Dalt. c.
Raym. :
276.

LARCENY from the person of a man without putting him in fear, is either done privily without his knowledge, (in which case it is excluded from the benefit of the clergy by 8 Eliz. c. 4.) or openly and avowedly before his face; as if one take off my hat from my head, and run away with it, or come into my shop and cheapen goods, and run away with them without paying for them, which is agreed not to be robbery, and as it seems, is more properly indictable as a trespass than felony, unless the offender were either unknown, or immediately fled the country if he were known; otherwise I have a remedy against him in the ordinary course of civil justice; and it seems rigorous to make such offences capital, which probably may sufficiently be provided against by more gentle methods. (1)

(1) The case in Dyer 224. was an indictment *quod vi et armis apud B. in via regia ibidem 40*l.* in pecuniis numerat, &c.* and the judgment was, that it is not robbery if the person is not put in fear as by assault and violence.—The case in Roll's Reports, is where the fear was excited (subsequent to the taking, and therefore only larceny. The case in Raymond, of running away with goods, after having obtained the delivery, upon pretence of purchasing them, is expressly decided to be felony. And Dalton, from Crompton only says the tortious taking of another's goods without a title so to do, is but a trespass. These references therefore by no means prove that the offences mentioned are not felonies, if committed with a felonious intent.—Vide Hale's Summary, 73, 74, 75. Kely. 43, 70. 1 Sid. 254.

SECT. 2. However it is certain, That all open larcenies from the person are within the benefit of the clergy, except such as are committed in a dwelling-house, &c. to the value of forty shillings, from which it is taken away by 12 Anne c. 7.

SECT. 13. Also a private larceny from the person shall have the benefit of the clergy, unless it be laid in the indictment as done *clam* and *secrete*, &c. in exact pursuance of the words of 8 Eliz. c. 4. Hale 529.

SECT. 14. And no such larceny shall have judgment of death but only as of petit larceny, if the jury find the offender guilty under the value of twelve pence; for the statute does not alter the nature of the offence, or make that capital which was not so before, but only leaves the offender to the judgment of the common law. Summary 75.
Delt. c. 100.
Prin. P. L. 292
2 Hale 366.
Folter 73.

CHAPTER THE THIRTY-SIXTH.

OF LARCENY FROM THE HOUSE.

THE other branch of complicated larceny, is that which is from the habitation of a man, which though it seem to have a higher degree of guilt than simple larceny, yet I do not find it distinguished from it by the common law, either as to the circumstances above mentioned, which are requisite to constitute the offence, or as to the punishment. Summary 76.
O. B. 1784. No.
233. & p. 1217.
4 Comm. 240.
Prin. P. L. 289.

However it is at this day excluded from the benefit of the clergy in many cases by several acts of parliament; which I shall particularly consider in the second book in the chapter concerning clergy. (1) Bar. Off. 375.

(1) First, In all larcenies above the value of twelve-pence committed 1st, in a church or chapel, with or without violence, or breaking the same, by 23 Hen. 8. c. 1. 25 Hen. 8. c. 3. 1 Edw. 6. c. 12. 5 & 6 Edw. 6. c. 9. & 10. — 2d. In a booth or tent in a market or fair, in the day time or in the night, by violence, or breaking the same, the owner or some of his family being therein, 5 & 6 Edw. 6. c. 9. — 3d. In a dwelling-house by day, by breaking the same, any person being therein, 3 & 4 Will. & Mar. c. 9. — 4th. In a dwelling-house by day, without breaking the same, any person being therein and put in fear, 3 & 4 Will. & Mar. c. 9. — 5th. In a dwelling-house by night, without breaking the same, the owner or some of his family being therein, and put in fear, 23 Hen. 8. c. 1. — Secondly, In all larcenies to the value of five shillings, committed, 1st. By breaking any dwelling-house, or any out-house, shop, or ware-house thereunto belonging, in the day time, although no person be therein, 39 Eliz. c. 15. Hale 508. and 522. Kely. 31. O. B. 1785. p. 312. 827. — 2d. By stealing privately in any shop, ware-house, coach-house, or stable, by day or by night, though the same be not broke open, and though no person be therein, 10 & 11 Will. 3. c. 23. (Fol. 78. Barr. 379). — Lastly, In all larcenies to the value of forty shillings, from a dwelling house or its out-houses without breaking in, and whether any person be therein or no. 12 Ann. c. 7.

CHAPTER THE THIRTY-SEVENTH.

OF PIRACY.

TO what has been said concerning such larcenies as are felonies by the common law, it may not be improper to add somewhat concerning piracy (1) and depredation at sea, which is a capital offence by the civil law.

(1) The king of England hath not only an empire and sovereignty over the British seas for the punishment of piracy, but, in concurrence with other princes and states, an undoubted jurisdiction and power in the most remote parts of the world. If any person, therefore, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we are in amity, trade, or correspondence, shall be robbed or spoiled in the narrow or other seas, whether the Mediterranean, Atlantic, Southern, or any branches thereof, either on this or the other side of the Line, it is piracy within the limits and cognizance of the Admiralty Sessions. Sir. Ch. Hodge's Charge; Old Bailey. 8 Will. 3.

40 Aff. 254.
Staunf. 17.
2 Hale 309.
S. P. C. 10.
Summary 77.
Co. Litt. 391.
3 Inst. 112.

Sec. 2. It is said, That before 25 Edw. 3. this offence was punished at common law as petit treason, if committed by a subject, and as felony, if committed by a foreigner: However it seems agreed, that after that statute by which all treason is confined to the particulars therein set down, it was cognizable only by the civil law.

5 Sr. Tr. 1.
8 Mod. 67. 76.
4 Comm. 740

Sec. 3. But this proving very inconvenient, because by that law no offender shall have judgment of death, without his own confession, or direct proof by eye-witnesses, it was enacted by 28 Hen. 8. c. 15. "That all felonies and robberies, &c. upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have or pretend to have power, authority or jurisdiction, shall be inquired, tried, heard, determined and judged in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same, in like form and condition, as if any such offence or offences had been committed or done in or upon the land; and such commissions shall be had under the king's Great Seal, directed to the admiral or admirals, or to his or their lieutenant, deputy and deputies, and to three or four such other substantial persons, as shall be named or appointed by the lord chancellor of England for the time being, from time to time and as oft as need shall require, to hear and determine such offences, after the common course of the laws of this land used for felonies and robberies, &c. done and committed upon the land within this realm."

Sec. 4. And it is further enacted by the said statute, "That if any person or persons happen to be indicted for any

" any such offence done, or hereafter to be done, upon the
 " seas, or in any other place above limited, that then such
 " order, process, judgment and execution, shall be used, had,
 " done and made, to and against every such person and
 " persons so being indicted, as against felons, &c. for any felony,
 " &c. upon the land, by the laws of the land is accustomed."

Sec. 5. And it is farther enacted by the said statute,
 " That such as shall be convicted of any such offence by
 " verdict, confession, or process by authority of any such
 " commission, shall have and suffer such pains of death,
 " losses of lands, goods, and chattels, as if they had been
 " attainted and convicted of such offence done upon the land,
 " and also that they shall be excluded from the benefit of the
 " clergy."

Vide the chapter
 of clergy in the
 second book. 2
 Hale 368, 370.
 Moor 756.

Sec. 6. In the exposition of this act it has been holden,—
 First, That it does not alter the nature of the offence so
 as to make that which was before a felony only by the
 civil law, now become a felony by the common law; for
 the offence must still be alledged as done upon the sea,
 and is no way cognizable by the common law, but only
 by virtue of this statute, which, by ordaining that in some
 respects it shall have the like trial and punishment, as are
 used for felony at common law, shall not be carried so far
 as to make it also agree with it in other particulars which are
 not mentioned. And from hence it follows, That this offence
 remains as before of a special nature, and that it shall not be
 included in a general pardon of all felonies which, as it was,
 before this statute, to be expounded of no felonies, which are
 such only by the civil law, shall continue still to have the same
 construction.

3 Inst. 112,
 113.
 Summary 77.
 C. C. C. 502.

Moor 758.
 3 Inst. 112.
 Co. Lit. 391.

Sec. 7. From the same ground also it follows, That no
 persons shall, in respect of this statute, be construed to be,
 or punished as, accessaries to piracies before or after, as
 they might have been if it been made a felony by the statute,
 whereby all those would incidently have been made acces-
 saries in the like cases, in which they would have been acces-
 saries to a felony at common law. And from hence it follows,
 That accessaries to piracy, being neither expressly named in
 the statute, nor by construction included in it, remain as
 they were before, and were triable by the civil law, if their
 offence were committed on the sea, but if on the land, by no
 law until 11 & 12 Will. 3. c. 7. for 2 & 3 Edw. 6. c. 24.
 which provides against accessaries in one county to a felony in
 another, extends not to accessaries to an offence committed
 in no county, but on the sea; but by the said statute of 11
 & 12

3 Inst. 112.
 Sum. 77. 215.

Yelv. 134, 135.

& 12 Will. they are triable in like manner as the principals are by the statute of 28 Hen. 8.

3 Inst. 112.
Co. Lit. 391.
Summary 77.
B. 2. c. 23.
f. 12.

Sect. 8. From the same ground also it follows, That an attainder for this offence corrupts not the blood, inasmuch as the statute only says that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at common law; but says not that the blood shall be corrupted, &c. (2)

(2) If the indictment be *vi et armis et felonice*, &c. as a robbery at common law, the blood may be corrupted; for piracy upon the statute is robbery, and offenders have been so indicted in the King's Bench, and on conviction, executed. But if the indictment be *piratice depra-davit* in the style of the civil law, the attainder corrupts not the blood. And this distinction will reconcile the passages upon this subject in 3 Inst. c. 49. and Co. Lit. f. 745. Vide 1 Hale 355.

3 Inst. 114.
Dyer 241. 308.
Summary 78.

Sect. 9. Yet it has been resolved, That an offender standing mute on an arraignment by force of this statute, shall have judgment of *pain fort & dure*; for the words of the statute are, "That a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land, &c." † But by 12 Geo. 3. c. 20. "Standing mute in piracy amounts to a conviction, and the court shall award the same judgment as on a conviction by verdict or confession."

3 Inst. 112.
S. P. C. 114.

1 Roll. 175.

Sect. 10. Secondly, It has been holden, That the indictment for this offence must alledge the fact to be done upon the sea, and must have both the words *felonice* and *piratice*: And that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, and consequently that the taking of an enemy's ship by an enemy, is not within the statute.

Moer 756.
1 Roll. 175.
Summary 77.
3 Inst. 113.

Sect. 11. Thirdly, It is agreed, That this statute extends not to offences done in creeks or ports within the body of a county, because they are, and always were, cognizable by the common law. † But it was doubted whether this statute of 28 Hen. 8. had not taken away the trial of these offences before the admiral or his lieutenant or commissary, which had occasioned a total disuse of such manner of trial to the encouragement of pirates, who could not be tried by this statute unless brought to England, at a great trouble and expence.

And made perpetual by 6 Geo. 1. c. 19.

Sect. 12. It is enacted therefore by 11 & 12 Will. 3. c. 7. which was continued by 1 Geo. 1. c. 25. for five years, and from thence to the end of the next sessions of parliament, "That all piracies, felonies and robberies committed in or upon the sea, or in any place where the admiral has jurisdiction, may be tried and determined at sea or upon the land, in any of his majesty's islands, or plantations, &c. to be appointed by the king's commission under the Great Seal,

“ Seal, or the seal of the Admiralty, directed to any of the
 “ admirals, &c. and such persons and officers by name, or for
 “ the time being, as his majesty shall think fit, who shall have
 “ power jointly or severally, by warrant under hand and
 “ seal of any of them, to commit any person against whom
 “ information of any such offences shall be given upon oath,
 “ and to call a court of Admiralty, which shall consist of
 “ seven persons at the least; and shall proceed in the trial
 “ of the said offenders, according to such directions as are
 “ set forth at large in the said statute.”

Sec. 13. And it is further enacted by the said statute,
 par. 8. “ That if any of his majesty’s natural born sub-
 “ jects or denizens of this kingdom, shall commit any piracy
 “ or robbery, or any act of hostility, against other his majes-
 “ ty’s subjects upon the sea, under colour of any commission
 “ from any foreign prince or state, or pretence of authority
 “ from any person whatsoever, such offender and offenders,
 “ and every of them, shall be deemed, adjudged, and taken
 “ to be pirates, felons and robbers; and they and every
 “ of them, being duly convicted thereof according to this act,
 “ or the aforesaid statute of king Henry the Eighth, shall have
 “ and suffer such pains of death, loss of lands, goods and chat-
 “ tels, as pirates, felons and robbers upon the seas ought to
 “ have and suffer.”

Sec. 14. And it is farther enacted by the said statute,
 “ That if any commander or master of any ship, or any sea-
 “ man or mariner, shall in any place where the admiral hath
 “ jurisdiction, betray his trust and turn pirate, enemy or rebel,
 “ and piratically and feloniously run away with his or their
 “ ship or ships, or any barge, boat, ordinance, ammunition,
 “ goods or merchandizes, or yield them up voluntarily to any
 “ pirate, or bring any seducing message from any pirate,
 “ enemy or rebel, or consult, combine, or confederate with,
 “ or attempt or endeavour to corrupt, any commander, mas-
 “ ter, officer or mariner to yield up or run away with
 “ any ship, goods or merchandize, or turn pirate, or go
 “ over to pirates, or if any person shall lay violent hands
 “ on his commander, whereby to hinder him from fighting
 “ in defence of his ship and goods committed to his trust, or
 “ that shall confine his master, or make or endeavour to make
 “ a revolt in his ship, shall be adjudged to be a pirate, felon
 “ and robber; and being convicted thereof, according to the
 “ direction of this act, shall have and suffer pains of
 “ death, loss of lands, goods and chattels, as pirates, felons
 “ and robbers upon the seas ought to have and suffer.”

A captain doubly
 insured his ship
 and cargo; and,
 having run the
 cargo on shore,
 procured the ves-
 sel to be fraudu-
 lently burnt.
 This is no piracy,
 by reason of the
 special trust re-
 posed in the of-
 fender by his
 owners. 8 Mod
 70, and 67.

Sect. 15. And it is farther enacted by the said statute, "That all and every person and persons whatsoever, who shall either on the land or upon the seas, wittingly or knowingly set forth any pirate, or aid and assist, or maintain, procure, command, counsel, or advise any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever, so as aforesaid, setting forth any pirate, or aiding or assisting, maintaining, procuring, commanding, counselling or advising the same, either on the land or upon the sea, shall be adjudged to be accessory to such piracy and robbery done and committed: And further, That after any piracy or robbery is or shall be committed by any pirate or robber whatever, every person or persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall on the land or upon the sea receive, entertain, or conceal any such pirate or robber, or receive or take into his custody, any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be by this statute likewise adjudged to be accessory to such piracy and robbery: And that all such accessories to such piracies and robberies, shall be enquired of, tried, heard, determined and adjudged according to the common course of the law, according to the said statute of 28 Hen. 8. as the principals of such piracies and robberies may be, and no otherwise; and being thereupon attainted shall suffer such pains of death, loss of lands, goods and chattels, and in like manner as the principals of such piracies, robberies and felonies, ought to suffer according to the said statute of Hen. 8. which is declared to be in full force; any thing in this last act to the contrary notwithstanding."

Sect. 16. And by 4 Geo. 1. c. 11. s. 7. "All persons who shall commit any offence for which they ought to be adjudged pirates, felons or robbers, by 11 & 12 Will. 3. may be tried and judged for every such offence, according to the form of 28 Hen. 8. and shall be excluded from their clergy."

† *Sect. 17.* And it is also enacted by 8. Geo. 1. c. 24. made perpetual by 2 Geo. 2. c. 28. "That if any commander or master of any ship or vessel, or any other person, shall any wise trade with any pirate by truck, barter, exchange, or in any other manner; or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision

“vision or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate, felon or robber upon the seas, knowing him to be guilty of such piracy, felony or robbery, such offenders shall, in every of the said cases, be deemed guilty of piracy, felony and robbery, and may be tried, &c. according to the provisions of the 28 Hen. 8. c. 15, and the 11 and 12 Will. 3. c. 71.”

† *Sec. 18.* And it is further enacted by the said statute, “That in case any person or persons, belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship and vessel, and, tho’ they do not seize and carry off such ship or vessel, shall throw over board or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person or persons who shall be guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid.”

† *Sec. 19.* And it is further enacted by par. 2. “That every ship or vessel, which shall be fitted out with a design to trade with, or supply, or correspond with any pirate; and all and every goods and merchandize put on board the same for any purpose or intent as aforesaid, shall be, *ipso facto*, forfeited, one moiety to the king, the other to the informer, who may sue for, and recover the same in the Court of Admiralty.”

† *Sec. 20.* And by par. 3. “All persons who are made accessories by the 11 and 12 Will. 3. c. 7. shall be deemed and taken to be principal pirates, felons, and robbers, and shall be proceeded against accordingly.” And also, by par. 4. “That all and every offender or offenders convicted of any piracy, felony or robbery by virtue of this act, shall be excluded from the benefit of clergy. Also seamen maimed in fight against pirates shall receive the rewards in the 23 Car. 2. c. 11. and be admitted into Greenwich hospital. And masters or seamen not defending themselves against pirates, or who shall utter any discouraging words, shall, if the ship be taken, forfeit their wages to the owners, and suffer six months imprisonment.”

† *Sec. 21.* Also it is enacted by 18 Geo. 2. c. 30. “That all persons, being natural born subjects or denizens of his majesty, who during any wars have committed any hostilities upon the sea, or in any haven, river, creek, or place, where

The adherence to the king's enemies was thought to make the offence high treason. This statute was made therefore to remove the doubt,

“ where the admiral or admirals have power, authority, or jurisdiction, against his majesty's subjects by virtue or under colour of any commission from any his majesty's enemies upon the sea, or any the places where the admiral hath jurisdiction as aforesaid, may be tried as pirates, felons, and robbers in the said Court of Admiralty, on ship board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery are directed to be tried; and on conviction shall suffer as any other pirates, &c. ought by virtue of the 11 and 12 Will. 3. c. 7. or any other act, provided that any person who shall be tried and acquitted, or convicted according to this act for any of the said crimes, shall not be liable to be prosecuted for the same crime or fact, as high treason. But this act shall not prevent any persons who shall not be tried according to it, from being tried for high treason, by 28 Hen. 8. c. 5.”

† *Stat.* 22. And it is further enacted by 32 Geo. 2. c. 25. f. 12. “ That in case any commander of any private ship of war, duly commissioned according to the directions of this act, or the 29 Geo. 2. c. 34, shall agree with the commander or other person of, or belonging to any neutral or other ship or ships, vessel or vessels, except those of his majesty's declared enemies, for the ransom of any such neutral or other ship, &c. or the respective cargo or cargoes thereof, or any part thereof, after the same shall have been taken as prize, and shall, in pursuance of any such agreement or agreements, actually quit, set at liberty, or discharge any such prize or prizes, instead of bringing the same into some port or ports belonging to his majesty's dominions, every such offender shall be deemed guilty of piracy, felony and robbery, and on conviction (in the manner as the act describes) shall suffer such pains of death, &c. as pirates, felons, and robbers upon the seas ought to suffer according to the laws now in being. But it is provided, that the commander of any private ship of war, upon the capture of any neutral vessel, *which by any law or treaty shall be liable only to the forfeiture of such contraband goods as shall be on board thereof*, may receive such goods, in case the commander is willing to deliver them, and thereupon quit, set at liberty, or discharge such neutral ship or vessel.”

† *Stat.* 23. And for the more speedy bringing of offenders to justice, and to prevent the inconveniencies occasioned by want of frequently holding a session of admiralty for the trial of offences committed on the high seas, it is further enacted, by 30 Geo. 2. c. 25. f. 20. “ That a session of oyer and terminer and gaol delivery, for the trial of offences committed upon the high seas, within the jurisdiction of the admiralty of England,

By 22 Geo. 3. f. 12. c. 25. all contracts for ransoming any private vessel, &c. captured by the king's enemies are void, and the offender liable to a penalty of 500*l.* Wood's Intt. 369, 473.

“ England, shall be held twice at the least in every year, that is to say, in the several months of March and October in each year, at Justice Hall in the Old Bailey, London; except at such times as the sessions of oyer and terminer and gaol delivery for the city of London and county of Middlesex shall be appointed to be there held; or in such other places within *England* as the lord high admiral of Great Britain, or the commissioners for executing the office, or any three or more of them shall, in writing under their hands, directed to the judge of the court of admiralty for the time being, appoint.”

4 Comm. 265.

† *Stat. 24.* Any one of the commissioners named in the commission of oyer and terminer for trying the offences aforesaid, and also any justice of the peace may take informations, upon oath, touching any piracy, felony, or robbery committed as before recited, and, by warrant under hand and seal, cause the offender to be apprehended and committed to the county gaol, and shall bind over all persons whom they shall respectively judge necessary to appear, prosecute, and give evidence against the said offender at the then next admiralty sessions, which information and recognizance shall be transmitted to the register to be laid before the court, and the marshal, his deputy, all sheriffs, and other officers whatsoever for keeping of the peace, &c. are enjoined diligently to obey and execute the precepts and orders of the court.

Vide section 21 to 24 of the before recited statute.

For the form of an indictment in piracy, vide *Croc. Cir. Com.* 520.

CHAPTER THE THIRTY-EIGHT.

O F B U R G L A R Y.

AN D now we are come to offences against the habitation of a man, which are of two kinds, viz. Burglary and Arson.

Burglary is a felony at the common law, in breaking and entering the mansion-house of another, or, as some say, the walls, or gates of a walled town, in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not.

P. Cor. 178, 185, 264.
Pulton 132.
Stain. 30.
1 Hale 549.
Dalt. c. 151.
Cicero pro. dom. c. 41.
Leg. Can. l. 61.
Wilk. 173. Ang.
Sax. p. 273.
q3. 3 Inst. 63.

Spelman tit. Hamfecken. Sum. 79. 2 Hale 360. 22 Aff. 39, 95. B. Cor. 93. 3 Inst. 63.
Crom. 31. 4 Comm. 223.

For the better understanding whereof, I shall consider the following particulars:—First, What shall be accounted night-time for this purpose. Secondly, Whether there must be both

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an actual entry and breaking. Thirdly, What breaking is sufficient. Fourthly, What entry. Fifthly, In what place this offence may be committed. Sixthly, What degree of guilt is required in the principal intention.

Sett. 2. As to the first point, viz. What shall be accounted night-time for this purpose; there are some opinions, That burglary may be committed at any time after sun-set, and before sun-rising; but it seems the much better opinion, That the word *nocturniter*, which is precisely necessary in every indictment for this offence, cannot be satisfied in a legal sense, if it appear upon the evidence, that there was so much day-light at the time, that a man's countenance might be discerned thereby.

Dalt. c. 151.
S. P. C. 30.
3 Inst. 63.
Savil. 47.
Crom. 32. 33.
7 Co. 6. 34.
Summary 79.
1 Hale 550.
Roll. 454.
Moore 660.

Cro. Eliz. 583. 9 Co. 66. 4 Comm. 224.

Sett. 3. As to the second point, viz. Whether there must be both an entry and breaking. Notwithstanding some loose opinions to the contrary, there seems to be no good cause to doubt, but that both are required to compleat this offence; for the words, *fregit* and *intravit*, being both of them precisely necessary in the indictment, both must be satisfied: And *a fortiori* therefore there can be no burglary, where there is neither of them; as if on a bare assault upon a house the owner sling out his money.

Dyer 99.
S. P. C. 30.
3 Inst. 64.
Summary 80.
1 Hale 552, 555.
556.
Con. Dalt. c. 151.
Crom. 31.
Dallison 22. Pult. 152. Foster 108. O. B. 1785. p. 216.

Sett. 4. As to the third point, viz. What breaking is sufficient. It seems agreed, That such a breaking as is implied by law in every unlawful entry on the possession of another, whether it lie open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice & burglariter fregit*, except in some special cases, in which it is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, That if one enter into a house by a door which he finds open, or through a hole which was made there before, and steal goods, &c. or draw any thing out of a house through a door or window which were open before, or enter into a house by the doors open in the day-time, and lie there till night, and then rob and go away, without breaking any part of the house, he is not guilty of burglary.—But it is certain, That he would have been guilty thereof if he had opened the window, or unlocked the door, or broke a hole in the wall, and then had entered, &c. or if having entered by a door which he found open, or having lain in the house by the owner's consent, he had but unlatched a chamber door; or if he had come down by the chimney: (in which case though

3 Inst. 64.
Sum. 80. 82.
1 Hale 508, 527,
551, 552, 555.
Crom. 34. 32.
Dalt. c. 151.
Kelynge 67.
Hutton 20.
C. Car. 65, 225.
Dyer 99.
2 Hale 553.
1 And. 114, 115.
Dalt. c. 151.
Savill. 59.
Foster 107.
O. B. 1784. p. 744.

it might be said, That the house was open there, and so not actually broken; yet it was as much inclosed as the nature of the thing would bear.) And according to some opinions, he would have been in like manner guilty, if upon an assault made by him upon the house, with an intent to rob it, the owner had opened the door in order to drive him off, and thereupon he had entered. In which case, as some say, the opening of the door by the owner, being occasioned by the felonious attempt of the other, is as much imputable to him as if it had been actually done by his own hands.

Q. B. 1784.
P. 744.

Crompt. 32.
Contra: Anderson
son 115.

SECT. 5. And it has also been resolved, That where divers persons came to a house with an intent to rob it, and knocked at the door, pretending to have business with the owner, and being by that means let in, rifled the house, they were guilty of burglary (a). Also it hath been adjudged, That those were no less guilty, who having a design to rob a house, took lodgings in it, and then fell on the landlord and robbed him; for the law will not endure to have its justice defrauded by such evasions. And for the like reason, *a fortiori*, it has been resolved, That where persons, intending to rob a house, raised a hue and cry, and prevailed with the constable to make a search in the house, and having got in by that means, with the owner's consent, bound the constable, and robbed the inhabitants, they were guilty of burglary. For there cannot be a greater affront to publick justice, than to make use of legal process as a state for such villainous purposes; and therefore the whole act is esteemed tortious *ab initio*.

(a) Le Motts case related by Wild to Kelynge 42.
Kely. 52, 52.63,
O. B. 1784. No. 541.
Crom. 32.
Dalt. c. 151.
Summary 81.
1 Hale 552.
3 Inst. 64.
4 Comm. 225

SECT. 6. It is recited by 12 Ann. c. 7. "That there had been some doubt, Whether the entering into a mansion-house, without breaking the same, with an intent to commit some felony, and breaking the said house in the night-time to get out, were burglary." And thereupon it is declared and enacted, "That if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony, or being in such a house, shall commit any felony, and shall in the night-time break the said house to get out of the same, such person is, and shall be taken to be, guilty of burglary, and ousted of the benefit of clergy, in the same manner as if such person had broken and entered the said house in the night-time, with an intent to commit felony there."

SECT. 7. As to the fourth point, *viz.* What entry is sufficient to this purpose. It seems agreed, That any the least entry, either with the whole, or with but part of the body, or with any instrument, or weapon, will satisfy the word *intravit* in an indictment of burglary; as if one do but put his foot over a threshold, or his hand, or a hook, or pistol, within

Dalt. c. 151.
Summary 81.
Kelynge 67.
Pulton 132.
1 And. 115.
1 Hale 553, 555.
Foster 408.
Crom. 31, 32.
4 Comm. 245.

within a window, or turn the key of a door which is locked on the inside, or discharge a loaded gun into a house, &c. (1)

(1) But quere, if the instrument must not be introduced for the purpose of committing the felony. There are, where thieves, having bored a hole *through* the door with a center bit, and part of the chip were found in the inside of the house, yet, as they had neither got in themselves, nor introduced a hand or instrument for the purpose of taking the property, the entering was ruled incomplete. O. B. 1785, p. 216.

1 Hale 439, 555.
Sum. 80, 81.
Fent. 350, 353.
Kely. 111.
Crom. 52.

Sec. 8. Nay, it is certain, That in some cases one may be guilty of burglary, who never made any actual entry at all; as where divers come to commit a burglary together, and some stand to watch in adjacent places, and the others enter, and rob, &c. For in all such cases, the act of one is in judgment of law the act of all.

Con. Sum. 81.
Dalton 131.
1 Hale 555.

Sec. 9. And upon the like ground, it seems difficult to find a reason, why a servant who confederating with a rogue, lets him in to rob a house, &c. should not be guilty of burglary as much as he; for it is clear, That if the servant were out of the house, the entry of the other would be adjudged to be his also; and what difference is there when he is in the house? (2)

(2) It has been determined, by all the judges, upon a special verdict, that it is burglary in both the servant and the thief; and not to be distinguished from the case where one watches at the front end, while others go in. *Strange 881.* O. B. 1784, No. 520. 10 St. Tr. 433.

1 Hale 510.
4 Co. 20.
1 Inst. 14. 67.
Sum. 82, 86.
1 Inst. 14.
B. 1. 144.
B. Com. 53.
22 Aff. 30, 95.
Dalt. 15.
27 Aff. 38.
Fent. 38, 39.
1 And. 362.
S. P. C. 30.
Kelynge 27.
Popham 42.
Pinn. P. L. 274.
Soc. 61.
Verb. Buglaria.

Sec. 10. As to the fifth point, *viz.* In what place this offence may be committed. It seems to be the current opinion at this day, That it can be committed only in a dwelling house; and that the indictment for it must necessarily alledge the fact *in domo mansionali*. And Sir Edward Coke seems to say, That the breaking a church, &c. is therefore burglary, because the church is the mansion-house of God. But I can find nothing in the more ancient authors to countenance this nicety; for the general tenor of the old books seems to be, That burglary may be committed in breaking houses, or churches, or the walls, or gates of a town. And *Stamford* and *Anderjoun* mentioned precedents of indictments of burglary *in domo* without adding *mansionali*. However the constant course of late precedents and opinions makes it certainly a very dangerous, if not an incurable fault, to omit the word *mansionali* in an indictment of burglary in a house; and therefore without question, it ought always to be inserted where the truth of the case will bear it. But surely it cannot be necessary or proper to have any such word in an indictment of burglary in a church, which by all the books above cited, seems to be taken as a distinct burglary from that in a house.

1 Hale 266.
Sum. max. 82.
Crom. 52.
Dalt. 131.
Al. 10, 11.

Sec. 11. However it is agreed by all, That a house wherein a man dwells but for part of the year, or a house which one has hired to live in, and brought part of his goods into, but has not yet lodged in, or a chamber in one of the inns of court

court wherein a person usually lodges, or house which a man's wife hires without his privity, and lives in by herself without him, may be called his dwelling-house; and will sufficiently satisfy the words *domus mansionalis* in the indictment, whether any person were actually therein, or not, at the time of the offence.

Sett. 12. Also all out-buildings, as barns, stables, dairy-houses, &c. adjoining to a house, are looked upon as part thereof, and consequently burglary may be committed in them; but if they be removed at any distance (a) from the house, it seems that it has not been usual of late to proceed against offences therein as burglaries.

O. B. 1785, No. 483. (a) An out-house, occupied with, but separated from, the dwelling house, by an open passage eight feet wide, and not within or connected by any fence inclosing both, is not within the curtilage. *Rex. v. Garland, East. T. 1776, M. S.*

Sett. 13. If several persons dwell in one house, as servants, guests, tenants at will, or otherwise, having no fix'd and certain interest in any part thereof, and a burglary be committed in any of their apartments; it seems clear, that the indictment shall lay the offence in the mansion-house of the proprietor, &c.—But if one hire a distinct apartment in a house for his lodging for a certain time, and a burglary be committed therein, I can see no good reason why the indictment may not lay the offence in *domo mansionali* of such lodger; for it seems to be agreed, That an indictment for a burglary committed in a chamber in one of the inns of court, may lay the offence in *domo mansionali* of the owner of the chamber; (b) and why may not such an apartment, with as much propriety be called the mansion-house of him that takes it, during the time that he has a certain interest in it? For so long as it is severed by the lease, it seems in the eye of the law to be as distinct from the other parts of the house, as if the person who rents it had a freehold or inheritance in it.

heritance; for life, or during residence.—So, a house divided into separate tenements, with a distinct outward door to each, will be separate houses, as *Newcastle Hospie. Lee v. Gansel, Cowper 2.—2 Bask. 532.*

Sett. 14. As to the objection, That he goes into the house by the same door with the other inhabitants, and therefore is but an inmate, and the whole ought to be considered but as one house; I answer, That he must have some way to his apartment as incident to his interest in it, and that such way lying through a door which is common to him with others, doth not make the apartment itself in any respect less his own, than a way through a door belonging to himself only would have done; (c) and if the law be so in this case, it seems to me very reasonable also, That if such a lodger take also a cellar in

owner does not sleep in any part of the house; for in that case each apartment is a separate mansion. *Trenshaw's Case. Hil. 27 Geo. 3. M. S. vide Turner's Case, Q. B. 1784. p. 391.*

4 Coke 40.
1 Jones 394.
Kely. 43. 46.
Pop. 42. 52.
3 Institute 64.
Fulton 132.
Foster 177.

3 Institute 64.
Dalt. c. 151.
B. Col. 180.
Crompton 32.
1 Hale, 558.
Summary 82.
Kely. 27, 52, 82.

4 Comm. 245.
the dwelling house,

O. B. 1785,
p. 371.
1 Hale 556.
Con. Kely. 83.
Crom. 32.
Dalt. c. 151.
3 Inst. 65.
Co. Lit. 48.
Summary 83.

(b) Chambers have separate outward doors, which are the extremity of obstruction; and are enjoyed as separate property, as cellars or in-

(c) There being only one door in common to all the inhabitants, make no difference, where the

(a) Provided the owner does not dwell in any part of the house.—*Sed quære* for Kel. 83. seems contra.

the said house, a burglary committed in such cellar, may be alledged in *domo mansionali* of the lodger, whether the cellar had any communication with the house or not (a) for since it seems to be agreed, That a barn or stable, or other out-building near to a house, shall be looked on as part thereof, why should not such a cellar have the like estimation.

Sett. 15. However it is agreed by all, That if one hire a part of a house to lodge in, which is actually divided from the rest, and have a door of its own to the street, a burglary therein may be alledged in *domo mansionali* of such person. (b)

(b) If the owner live under the same roof with the inmates, there must be a separate *outer* door or the whole is the mansion of the owner; but if the owner inhabit no part of the house, or even if he occupy a shop or a cellar in it, but do not sleep therein it is the mansion of each lodger, although there be but one outer door. Rogers's Case, Mich. 13 Geo. 3. M. S.

Hutton 33.
1 Hale 557, 558.
vide 13 Geo. 3.
c. 38 respecting
burglary in the
work-shops of
the plate glass
manufactory.

Sett. 16. But if he had taken it as a shop or work-house for his use in day-time only, it seems that a felony therein cannot be alledged in a mansion-house; not of him that lets it, because it is severed by the lease from that part of the house which belongs to him, nor of him to whom it is let, because he takes it not to lodge in. (c)

(c) If he sleep in any part of the building, however distant that part is from the shop, it may be alledged his mansion-house; provided the owner does not sleep under the same roof also. Carroll's Case, Easter Term, 1782, M. S.

22 Aff. 95.
B. Cor. 93.
S. P. C. 30.
Dalt. c. 151.
But by 5 &
6 Edw. 6. c. 9.
clergy is taken
from this offence.

Sett. 17. From what has been said it clearly appears, That no burglary can be committed by breaking into any ground inclosed, or booth, or tent, &c. for there seems to be no colour from any authority ancient or modern, to make any offence burglary that is not done either against some house, or church, or the walls, or gates of some town.

Dyer 99.
Dalt. 22.
3 Inst. 65.
Kely. 30, 67.
Sum. 83, 125.
Crom. 32.
Con. Dalt. c.
151.
1 Hale 562.

Sett. 18. As to the sixth point, *viz.* What degree of guilt is required in the principal intention of the offender? It seems clear, That there can be no burglary but where the indictment both expressly alledges, and the verdict also finds, an intention to commit some felony; for it appear that the offender only meant to commit a trespass, as to beat the party, &c. he is not guilty of burglary. (d)

(d) A servant embezzled money intrusted to his care; left ten guineas in his trunk; quitted his master's service; returned; broke and entered the house in the night, and took away the ten guineas, and adjudged no burglary. Rex v. Bingley, O. B. Trin. 3 Jac. 2. M. S.

(e) King v.
Gray, Strange
481, expressly
in point.

Sett. 19. However it seems much the better opinion, That an intention to commit a rape, (e) or such other crime which is made felony by statute; and was a trespass only at common law, will make a man guilty of burglary, as much as if such offence were a felony at common law, because wherever a statute makes any offence felony, it incidentally gives it all the properties of a felony at common law.

† *Stat.* 20. To remove an inducement for the frequent commission of Burglaries, &c. By 10 Geo. 3. c. 48. "Buy-
"ers or Receivers of stolen jewels, gold or silver plate,
"watches, where the stealing shall have been accompanied
"with a burglary, or a robbery on the highway, shall be
"triable as well before the conviction of the principal,
"whether he shall be in or out of custody, as after—and
"transported for fourteen years." Vide Appendix
the Seventh, p.
235.

† *Stat.* 21. And to check this offence in its progress.
By 23 Geo. 3. c. 88, "If any person shall be apprehended,
"having upon him, any picklock key, crow, jack, bit, or
"other implement, with an intent feloniously to break and
"enter into any dwelling-house, ware-house, coach-house,
"stable, or out-house, he shall be deemed a rogue and vaga-
"bond within the 17 Geo. 2. c. 5." Vide O. B. 1786,
p. 485, for an
opinion upon
this act.
N. B. This was
a misdemeanour
at common law.
Cafes temp.
Hardwicke, p.
371.

EVERY man's house is considered as his castle, as well for his defence against injury and violence, as for his repose. 5 Co. 92. To violate this security is considered of so atrocious a nature. 4 Comm. 226, that the alarmed inhabitant, whether he be the owner or a mere inmate, Cro. Car. 544, is permitted to repel the violence by the death of the assailant, without incurring the penalties of cruel excusable homicide, 24 Hen. 8. c. 5; and, should the aggressor escape with impunity from the execution of his guilty purpose, the sword of public justice stands also ready drawn against his life. Prin. P. L. 273. So anxiously indeed does the law interpose its concern to preserve inviolate this domestic immunity, that the bare intention to commit the felony constitutes the essence of the crime. 4 Comm. 227. Foster 109. In this point, burglary seems to participate the principles of high treason. Brook Ab. Tit. Forfeit. The penal consequences however are less severe; The forfeiture of property is not so extensive; and for a course of time, the life of the convict was saved by the merciful plea of clergy. 4 Comm. But as the increase of national opulence furnished richer temptations to the spoiler, the interposition of additional terrors became necessary. Therefore by 18 Eliz. c. 7. clergy is taken away from the offence. 4 Comm. 366. 2 Hale 364. Postr. 357. and by 3 & 4 W. & M. c. 9. from accessories before the fact.—By 10 & 11 Will. 3. c. 23. Whoever shall convict a burglar is exempted from all parish and ward offices, where the offence was committed. To this the 5 Ann. c. 31. has super-added a reward of forty pounds. And if an accomplice being out of prison, shall convict two or more offenders, he is intitled also to a pardon of the felonies as enumerated in the act.

CHAPTER THE THIRTY-NINTH.

OF ARSON.

A RSON is a felony at common law, in maliciously and voluntary burning the house of *another* by night or by day. 1 Hale 526.
B. Cor. 135,
155.
S. P. C. 36.
2 Inst. 66.
Dalt. c. 105.
2 Inst. 188.
4 Comm. 230.

And I shall consider: First, What is such a house in which Arson may be committed. Secondly, Whether this offence may be committed in the offender's own house. Thirdly, How much of the house ought to be burnt. Fourthly, With what degrees of malice.

Sett. 1. As to the first point, viz. What is such a house in which arson may be committed. It seems agreed, That not only a mansion-house; and the principal parts thereof, but also any other house, and the out-buildings, as barns and stables, adjoining thereto; and also barns full of corn, whe- 3 Inst. 67.
4 Co. 20.
Dalt. c. 105.
11 H. 7. 1.
B. Cor. 226.
3 Inst. 69.
S. P. C. 36.

Summary 86. 1 Hale 507, 579. 4 Comm. 221, 366, 310.

ther they be adjoining to any house or not, so far secured by law, that the malicious burning of them is arson. And it is said, That in an indictment they are well expressed by the word *domus*, without adding *mansionalis*.

1 Hale 568.
Summary 86.
3 Inst. 67.
Britt. f. 16.
S. P. C. 36.
Dalt. c. 105.
2 Burn. 289.
(a) A person
the entrance to
which is through
a dwelling house
is within this
act. Donevan's
Case Black. 682.
(b) Accessories
before are ex-
cluded by 4 & 5
P. & M. c. 4.
But accessories
after are still in-
titled to clergy.
1 Hale 573.

Sec. 2. But it seems that at this day the burning of the frame of a house, or of a stack of corn, &c. is not accounted arson, because it cannot come under the word *domus*, which seems at present to be thought necessary in every indictment of arson. Yet it is said, That anciently the burning of a stack of corn was accounted arson. † And by the 9 Geo. 1. c. 22. whoever shall set fire to any house, (a) barn, or out-house; "or to any hovel, cock, mow, or stack of corn, hay, or wood; or shall forcibly rescue any person in lawful custody for the same; or shall procure another to join in committing any of the said offences,—shall suffer death, without benefit of clergy."—But it is resolved, (b) that this statute only excludes the principal (c) offender from his clergy, more clearly than he was excluded before (d); and does not alter the nature of the crime, or create any new offence.

(c) The King v. Spalding, East. T. 1780. Bream's Case, Trin. T. 1780. Pedley's Case, B. R. upon a special verdict, Trin. 22 Geo. 3. (d) Vide Alex. Poultern Case, 11 Coke 29.

Holme's Case.
1 Jones 351.
C. Car. 377.
S. d. vide Foster
116.

Sec. 3. As to the second point, viz. Whether arson may be committed in the offender's own house. It seems clearly agreed, That one seized in fee, or but possessed for years, of a house standing by itself at a distance from all others, cannot commit felony in burning the same. (e)

Also it seems the much stronger opinion, That a man so seized or possessed of a house in town, who burns his own with an intent to burn his neighbours, but in the event burns his own only, is not guilty of arson; for by the general tenor of the books speaking of this offence, it seems to be supposed to be done in the house of another, and not of the offender. Neither shall any act, which is only a crime in respect of the injury which it does, or may do, to another, be made a felony by reason of an intention thereby to commit a felony, if such intention be not executed.—However this is certainly an offence highly punishable in regard of the malice thereof, and the great danger

(e) A lease for three years in possession, under a term for 99 years, originally granted by the person seized in fee, is not guilty of ARSON, by setting the house on fire. Bream's Case, Trin. 20 Geo. 3. M. S.—Nor a tenant by copyhold in possession, although the premises burnt, are surrendered to the lord to the use of a mortgagee, not admitted upon the surrender. Rex v. Spalding, Easter Term, 1780. *Sec. quere* if this point was determined, the indictment only charging that he burnt his own house, M. S.—Nor can a tenant in possession, be guilty of this offence, by setting the house he is so possessed of on fire; for the principle in Holme's Case, was intended to protect the person in actual possession. But Lord Mansfield seems to lament, while he is forced to admit the authority of that decision. Pedley's Case, B. R. Trin. 22 Geo. 3.—It is however determined that a widow, intitled to dower, but no dower assigned, from a house, the equity of the redemption of which had descended from her husband to her infant children, and for whose benefit she had let it and received the rent, is guilty of arson by burning it in the possession of her tenant.—And it was said that if she had been seized of the freehold, it would still have been felony; from whence it is contended that a reversioner who shall maliciously fire the houses in possession of his tenants under leases from himself or his ancestors, will be guilty of Arson. Harris's Case, Foster 113, to 116.—And there is a late case in which a pauper, who set fire to the parish work house, was held guilty of Arson.

to the publick which attends it, and the offender may be severely fined and imprisoned during the king's pleasure, and let on the pillory, and bound to his good behaviour during

Sec. 4. As to the third point, viz. How much of such house ought to be burnt, It seems to be clearly agreed, That neither a bare intention to burn a house, nor even an actual attempt to do it by putting fire to part of a house, will amount to felony, if no part of it be burnt; for the indictment must have the words *incendit & combussit*: But it is certain, That if any part of the house be burnt, the offender is guilty of felony, notwithstanding the fire afterwards be put out, or go out of itself.

Vide K. v. Sarah Macing, O. B. 1-61. p. 69.
1 Hale 570.
Summ. 85.
Durr. 105.
3 Inst. 66.
+ Comm. 222.

Sec. 5. As to the fourth point, viz. With what degree of malice such house ought to be burnt. It seems clear, That if the fire happened through negligence (b) or mischance, it cannot make him, who is the unfortunat cause of it, guilty of arson; for the indictment must alledge the offence to have been done *voluntarie ex malitia sua præcogitata & felonice*. Yet if one maliciously intending only to burn the house of A. happen thereby to burn the house of B. it is certain that he may be indicted as having maliciously burned the house of B. for where a felonious design against one man misses its aim, and takes effect upon another, it shall have the like construction as if it had been levelled against him who suffers by it.

(b) Vide ch. 53.
1 Hale 569.
3 Inst. 67.
Summ. 85.
Flow. 475.

CHAPTER THE FORTIETH.

OF FELONIES BY STATUTE.

OFFENCES more immediately against the Subject, made capital by Statute, and not reduced to any of the foregoing heads, are such as are committed;

1. Against Women.
2. Against the Rights of Marriage.
3. Against the Members of a Man's Body.
4. Against Records.
5. Against Cattle.
6. By Purveyors.
7. By Soldiers and Mariners.
8. By Hunters.
- + 9. By Destroyers of Fences, Turnpikes, and Bridges.
10. By Gaolers.
11. By Transporters of Sheep or Wool.
12. By Servants.
13. By Egyptians.

14. By Cutters of Pow-dike, and † Destroyers of Sluices, &c. on Navigable Rivers.
15. By Trespassers on the Borders, and Rioters.
16. By Bankrupts.
17. By Counterfeiters of Bank-Notes, Exchequer Bills, Stamps, South-Sea Bonds, Lottery Orders, &c.
18. Against Property adherent to the Freehold.
19. Against Ships in Distress, and by Plunderers of Wrecks.
- † 20. In taking, killing, and destroying Fish.
- † 21. By malicious Incendiaries.
- † 22. By maliciously Shooting at another, and by sending threatening Letters.
- † 23. By Smugglers.
- † 24. By buying and receiving Stolen Goods.
- † 25. By taking or advertising a Reward for Stolen Goods.
- † 26. By maliciously destroying Garments, Hop-binds, and Mine Engines.
27. By Destroyers of Looms, &c.
28. By not performing Quarantine.
29. By hindering the Exportation of Corn.

In treating hereof I shall first consider such points as relate to them all in general, and then descend to each crime in particular, in the order before set down.

As to what relates to them all in general, I will shew,—
First. Where an offence shall be said to be made felony by statute.—Secondly. What is incidentally implied in every such statute.

SECT. I. As to the first point it seems clear, That not only those crimes which are made felonies in express words, but also all those which are decreed to have or undergo judgment of life and member by any statute become felonies thereby, whether the word felony were omitted or mentioned.

SECT. 2. But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute, and therefore, if it be only prohibited under pain of forfeiting all that a man has, or of forfeiting body and goods, or of being at the king's will for body, land, and goods, it shall amount to no more than a high misdemeanor, punishable by imprisonment, &c.

SECT. 3. Also where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied, That such second offence ought to be committed after a conviction for the first; from whence it follows, That if it be not so laid in the indictment, it shall be punished

1 Hale 62, 64.
703.
R. Cor. 204.
3 Inst. 51.
2 Inst. 434.
Co. Lit. 391.
Hob. 112, 113.

Co. Lit. 391.
Hob. 270, 293.
3 Inst. 146.

1 Hale 324, 685.
57.
Summery 8.
2 Bull. 349.
Dyer 223.
1 Leon. 295.

punished but as the first offence; for the gentler method shall first be tried, which perhaps may prove effectual.

Sett. 4. As to the second point, viz. What is incidentally implied in every statute, making an offence felony. It seems clear, that every such statute does by necessary consequence subject the offender to the like attainder and forfeiture, &c. and also does require the like construction, as to those who shall be accounted accessaries before or after, and to all other intents and purposes, as is incident to a felony at common law.

felony created by statute, as to one at common law. 1 Inst. 47, 59, 90. 1 Hale 704. Crompton 42. Summary 215. Dalif. 11, 22, b. 2. c. 29. f. 13, 14. Salk. 542, 543. Misprision of felony is as well incidental to a

Sett. 5. Yet where such a statute saves the corruption of blood, it impliedly saves the descent of the land of the offender to his heir. Also where it saves the land to the heir, it prevents the corruption of blood so far. And it is said, That in both cases it saves the wife's dower, because wherever an heir takes as heir, he shall not void a title of dower in respect of the same inheritance. But notwithstanding such saving, the land shall be forfeited for the life of the offender.

Sett. 6. If one commit an offence which is made felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.

For a full account of this title, vide 4 Bac. Ab. tit. Statute, and the introduction to Barn's Justice.

CHAPTER THE FORTY FIRST.

OF R A P E.

OFFENCES against Women made felonies by statute are of two kinds. First, Rape. Secondly, Of forcible, improvident and clandestine marriage.

In treating of rape, I shall consider, First, What shall be called a rape. Secondly, How it is punished.

Sett. 1. As to the first point, It seems that rape is an offence in having unlawful and carnal knowledge of a woman, by force and against her will. But it is said, That no assault upon a woman in order to ravish her, howsoever shameless and outrageous it may be, if it proceed not to some degree of penetration, and also of her assention, can amount to a rape; however it is said, That this is, *prima facie*, an evidence of penetration.

Sett.

Braet. c. 28. Leges Gul. l. 19. 1 Hale, c. 58. 4 Comm. c. 152.

Wilk. Leg. Ang. Sax. 272, 290. 2 Inst. 433.

Co. Lit. 123. 4 Co. 39, 47. 2 Inst. 180. 12 Co. 37. 3 Inst. 59. 1 Hale 628. 1 St. Tr. 388. Summary 117. 1 Russ. Coll. p. 2, 94.

Dalt. c. 105, 607.
B. Pu. 55.
5 Ed. 4. 6.

1 Ruff. Col.
part 2. 100.
Bact. 147, 148.

S. P. C. 24.
Fech. 204.
1 Hale 628, 731.

Sec. 2. Offences of this nature are not any way mitigated, by shewing that the woman, at last yielded to the violence, if such her consent was forced by fear of death, or of dures. Nor is it any excuse, that she consented after the fact, or that she was a common strumpet; for she is still under the protection of the law, and may not be forced. But it was anciently said, to be no rape to force a man's own concubine. Also it hath been said by some to be no rape to force a woman who conceives at the time; for it is said, That if she had not consented, she could not have conceived: but this opinion seems very questionable, not only because the previous violence is no way extenuated by such a subsequent consent, but also because, if it were necessary to shew that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not, and likewise because the philosophy of this notion may very well be doubted of.

Pulton 124.
1 Hale 628, 731.
Ruff. Col. part 2, 100.

Sec. 3. It is a strong, but not a conclusive presumption against a woman, That she made no complaint in a reasonable time after the fact.

Bod. 147.
Dalt. c. 117.
1 Hale, 30.
Crom. 101.
Dyer 304.

Sec. 4. It was a question before 18 Eliz. c. 7. Whether a rape could be committed on a child of the age of six or seven years; but by that statute, "whosoever shall unlawfully and carnally know and abuse any woman-child under the age of ten years, shall suffer as a felon without clergy."

V. 1. Cr. Cr.
C. 1. 256.
3 Burr. 1606.
C. Cr. 312.

Sec. 5. Upon an indictment for this offence, it is no way material whether such child consented, or were forced; yet it must be proved, That the offender entered into her body, &c.

B. 2. c. 29, 6, 7.
80.
Dalt. c. 107.
H. 115.
S. P. C. 1366.

Sec. 6. All who are present and actually assist a man to commit a rape, may be indicted as principal offender, whether they be men or women.

Ruff. v. 2. p. 95. Vide Lord Baltimore's case, 4 Burr. 2179.

1 Hale 627.
Bact. 147, 148.
S. P. C. 21, 22,
23.
2 Inst. 171.
Dalt. c. 99.
Crom. 32.
con.
Co. Lit. 121.
Flet. 1. c. 42.
2 Inst. 180.
Quere F. Ut.
47.
B. Cor. 160.

Sec. 7. As to the second point, viz. How rape is punished, it is said, that of old time it was felony, and consequently punishable with death, especially if the party ravished were a virgin, unless such virgin would accept of the offender for her husband, in which case she might save his life by marrying him. But afterwards it was looked upon as a great misdemeanour only, but not felony; and the offender was punished with the loss of his eyes and testicles: And by the statute of *Westm.* 1. c. 13. It was reduced to a trespass, subjecting the offender to two years imprisonment, and a fine at the king's will. But the smallness of the punishment produces a great encouragement to the offence, it was made felony again, by the statute of *Westm.* 2. c. 34. and by 18 Eliz. c. 7. it is excluded from the benefit of clergy.

CHAPTER THE FORTY SECOND,

OF FORCIBLE, † IMPROVIDENT, AND
CLANDESTINE MARRIAGES.

THE marrying a woman of substance by force, and other offences of the like nature, were made felonies by 3 Hen. 7. c. 2. which was enacted in the following words.

Stat. 1. “Where women, as well maidens as widows and wives having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, be oftentimes taken by mis-doers, contrary to their will, and after married to such mis-doers, or to other by their assent, or defiled, to the great displeasure of God, and contrary to the king’s laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other: It is therefore ordained, established and enacted by our sovereign lord the king, by the advice of the lords spiritual and temporal, and the commons in the said parliament assembled, and by the authority of the same, That what person or persons from henceforth, that taketh any woman (to) against her will unlawfully, that is to say, maid, widow, or wife, that such taking, procuring, and abetting to the same, and also receiving wittingly the same woman so taken against her will, and knowing the same, be felony: And that such mis-doers, takers, and procurators to the same, and receitors, knowing the said offence in form aforesaid, be henceforth reputed and adjudged as principal felons: Provided always, that this act extend not to any person taking any woman, only claiming her as his ward or bond-woman.”

Stat. 2. And by 39 Eliz. c. 9. “All persons who shall be principals, or procurers or accessaries before such offence committed, are excluded from the benefit of the clergy.”

Stat. 3. In the construction of the said statute of 3 Hen. 7. c. 2. the following points have been resolved.—First, That the indictment must expressly set forth, both that the woman taken away had land or goods, or was heir apparent, and also that she was married or defiled, because no other case is within the preamble of the statute, to which the enacting clause clearly refers; for it does not say, That what person, &c. that taketh any woman against her will, but what person that taketh any woman *for* against her will.

Vide Kely. 21. and the trial of Haagen Swendzen for forcibly marrying Mrs. Rawlins; Mich. 1 Ann. 5 St. Tr. 450.

See 1 Hal., 667, 661, and 5 St. Tr. 468.
Fitz. 101, 102.
Holart 132.
C. Car. 483, 485, 488, 492.
Dalif. 22.
1 And. 115.
3 Ind. 61.
Summary 118.
Sivil 59.
12 Co. 20, 100, 110.

Hobart 182.
C. Car. 485,
489.

Sec. 4. Secondly, That the indictment ought also to allege, That the taking was for lucre, because the words of the preamble are so, but that it needs not set forth, That it was with an intention to marry or defile the party, because the words of the statute neither require such an intention, nor does the want thereof any way lessen the injury.

Hobart 182.
C. Car. 485.
1 Hale 660.

Sec. 5. Thirdly, That it is no manner of excuse, That the woman at first was taken away with her own consent, because if she afterwards refuse to continue with the offender, and be forced against her will, she may from that time as properly be said to be taken against her will, as if she had never given any consent at all; for till the force was put upon her, she was in her own power.

C. Car. 493
3 Krb. 193.
2 V. 243,
244.

Sec. 6. Fourthly, That is not material whether a woman so taken away, be at last married, or defiled, with her own consent or not, if she were under the force at the time, because the offender is in both cases equally within the words of the statute, and shall not be construed to be out of the meaning of it, for having prevailed over the weakness of a woman, whom by so base means he got into his power.

1 Inst. 61.
Dalif. 22.
S. P. C. 44.
Far. 132.

Sec. 7. Fifthly, That those who after the fact receive the offender, but not the woman, are not principals within this statute, because the words are, *receiving wittingly the same woman so taken*, &c. but it seems clearly, That they are accessaries after the offence, according to the known rules of common law.

C. Car. 482.
Summary 119.

Sec. 8. Sixthly, That those who are only privy to the marriage, but no way parties to the forcible taking away, or consenting thereto, are not within the statute.

C. Car. 488.
Hobart 183.
Summary 119.

Sec. 9. Seventhly, That where a woman is taken by force in the county of *A.* and married in the county of *B.* the offender may be indicted and found guilty in the county of *B.* because the continuing of the force there amounts to a forcible taking within the statute. (1)

(1) A woman thus taken away, and forcibly married, may give evidence against the offender, for he is no husband *de jure*. 1 Hale 661. 4 St. Tr. 455. 4 Comm. 209 Gibb. 418.

+ *Sec. 10.* As to improvident marriage it is enacted by 4 & 5 Phil. & Mar. c. 8. " That whoever above the age of fourteen (by flattery, trifling gifts, and fair promises) shall allure and take any woman-child unmarried within the age of sixteen, from and against the consent of her guardians, shall suffer two years imprisonment, and fine at discretion. If the offender deflower, or marry her, five years imprisonment, and fine as before: and if any female above twelve shall consent to unlawful matrimony, she shall forfeit all " her

" her lands to the next of kin, during the life of such person
" as shall so contract matrimony." (2)

(a) N. B. This forfeiture extends as well to the infant who consents, as to the husband who takes. Brown's cases Mich. 19 Geo. 3. The marriage must be clandestine, and to the disparagement of the heiress. 3 Mod. 84. If the guardian once consents, he cannot retract. 2 Mod. 128. 6 Mod. 168. A bastard under the care of her putative father, is within this act. Str. 1162. The offence is within the jurisdiction of the king's bench. 4 Mod. 145. 2 Lev. 179. 1 Sty. 162. See also 12 Car. 2. c. 24. 3 Mod. 24. Vaugh. 177. And that the court will grant an information for procuring an improvident or unequal marriage. Lev. 257. 5 Mod. 221.

† *Sett.* 11. Thirdly, As to clandestine marriage. It is enacted by 26 Geo. 2. c. 33. " That if any person shall solemnize
" matrimony, except the parties are quakers or Jews, in any
" other place than a church or public chapel, where banns
" have been usually published, unless by special licence from
" the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence of marriage be first had and obtained from some person or persons
" having authority to grant the same, he shall be guilty of
" felony, and transported for fourteen years, and the marriage
" be null and void." The prosecution to be within three
" years."

† *Sett.* 12. And it is further enacted, par. 16. " That if
" any person shall with intent to elude the force of this act,
" knowingly and wilfully insert or cause to be inserted in the
" register book of such parish or chapelry as aforesaid, any
" false entry of any matter or thing relating to any marriage;
" or falsely make, alter, forge, or counterfeit any such entry
" in such register, or any such marriage licence, or shall
" wilfully destroy any register book of marriages, or any part
" of such register book, or shall cause the same to be done,
" or shall assist in so doing, or shall knowingly utter or publish the same as true respectively, every person so offending,
" shall suffer death without clergy."

Vide Douglass 659, for a determination on this statute, which rendered all marriages illegal which had been celebrated during the space of 28 years in any church or chapel built subsequent to the passing of the act. But by 11 Geo. 3. c. 53. they are rendered valid, and the

clergymen who had celebrated such marriages are exempted from the penalties. Bur. 2250. 1 Black. 632. Kay. 752. Salk. 18, 19, 121. 2 Sid. 71.

CHAPTER THE FORTY-THIRD.

OF OFFENCES AGAINST THE RIGHTS OF MARRIAGE.

OFFENCES against the rights of marriage, at common law, are looked upon as spiritual offences, and punishable only by the Ecclesiastical law, but one of them is made felony, but not excluded from the benefit of the clergy.

C. Eliz. 94.

By

the loss of life or member, but only with fine and imprisonment. (1)

(1) A person who maims himself that he may have the more colour to beg, may be indicted and find. 1 Inst. 127. And by the like reason a person who disables himself that he may not be impressed for a soldier. 3 Burn. J. 115.

Sec. 4. As to the third point, viz. How such offences are punished by statute, it is enacted by 22 & 23 Car. II. c. 1. See 5 H. 4. c. 5. See 37 H. 8. c. 6. "That if any person shall on purpose and of malice fore-thought, and by lying in wait, unlawfully cut out, or disable the tongue, put out an eye, slit the nose, cut off a nose, or lip, or cut off or disable any limb, or member of any subject of his majesty, with intention in so doing to maim or disfigure, in any the manners before mentioned, such his majesty's subject, That then and in every such case the person or persons so offending, their counsellors, aiders, and abettors, knowing of, and privy to the offence, as aforesaid, shall be and are by the said statute declared to be felons, and shall suffer death as in cases of felony, without benefit of clergy."

Sec. 5. But it is provided by the said statute, "That no attainder of such felony shall extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods or chattels of the offender."

Woodburn and Coke's case at the Suffolk assizes, 8 Geo. 1. 6 St. Tr. 212. See 9 G. 1. c. 22.

Sec. 6. If a man attack another of malice fore-thought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute, together with all those who were his abettors, &c. and it shall be left to the jury on the evidence, whether there were a design to murder by maiming, and consequently a malicious intent to maim as well as to kill, in which case the offence is within the statute, though the primary intention was murder. (2)

(2) If the maim comes not within any of the descriptions of the act, yet it is indictable at common law, and may be punished by fine and imprisonment. Or an appeal may be brought for it at the common law; in which the party injured shall recover his damages. Or he may bring an action of trespass; which kind of action hath now generally succeeded the place of appeals in smaller offences not capital. Vide post. 2 vol. 15, 160. But it does not seem that in maiming there may be accessories after the fact. Ibid. p. 311.

For offences of maiming cattle, vide infra. ch. 46.

† *Sec. 7.* And it is enacted by 37 Hen. 8. c. 6. "That whoever shall maliciously, unlawfully, and wittingly cut, or cause to be cut off the ear or ears of any one of the king's subjects otherwise than by authority of the law, chance-medley, sudden affray, or adventure, shall forfeit treble damages to the party grieved, by action of trespass, and ten pounds to the king, in the name of a fine."

CHAPTER THE FORTY-FIFTH.

OF OFFENCES AGAINST RECORDS.

AT common law the embezzling, defacing, or altering any record, without due authority, was an offence highly punishable by fine and imprisonment, &c. and in many cases it was made felony by the following clause of 8 Hen. 6. c. 12.

3 Inst. 71, 72.
1 Hale 646, to
648.

Stat. 2. "It is ordered, That if any record or parcel of the same, writ, return, panel, process, or warrant of attorney, in the king's courts of Chancery, Exchequer, the one Bench or the other, or in his Treasury, be willingly stolen, taken away, withdrawn, or avoided, by any clerk, or by other person, because whereof any judgment shall be reversed: That such stealer, taker-away, withdrawer, or avoider, their procurators, counsellors, and abettors, thereof indicted, and by process thereupon made, thereof duly convicted by their own confession, or by inquest to be taken of lawful men, (whereof the one half shall be of the men of any court of the same courts, and the other half of the other) shall be judged for felons, and shall incur the pain of felony: And that the judges of the said courts, of the one Bench or of the other, have power to hear and determine such defaults before them, and thereof to make due punishment, as afore is said."

Stat. 3. In the construction of this clause, it hath been holden: First, That it extends only to the courts which are expressly named; and to the court of Chancery, so far only as it proceeds according to the course of the common law.

3 Inst. 71.
1 Hale 646, to
648.

Stat. 4. Secondly, That it extends not to such offence by the judges of any court; for whereas it begins with expressly naming clerks which are inferior to them, it shall not be intended to include them under the general words following; however by 8 Ric. 2. c. 4. "Judges as well as clerks are to pay a fine to the king, and make satisfaction to the party for falsly entering pleas or rasing rolls, or changing verdicts, to the disherison of any one." And they are highly punishable at common law for other offences of like nature, as for inserting a bill of indictment not found by the jury among those which were found, and such like. And justice *Ingram* in the reign of *Edward the First* was fined eight hundred marks, for rasing a fine of thirteen shillings and four pence set on a poor man, and making it six shillings and eight pence.

3 Inst. 72.

2 R. 3, 10.
3 Mod. 66.
B. C.
B. Presp. 31.
Con. B. present.
23 indict. 14, 59.
3 Inst. 72.

2 Roll. 81.

2 R. 3. 10.
S. P. C. 36.
3 Inst. 72.
11 Rep. 34.

Sett. 5. Thirdly, That not only such an alteration whereby a judgment is actually reversed, but also such whereby it is reversible, whether it were made before or after the judgment was given, or whether it be or be not afterwards amended by the court, is within this act; for those words in the statute *whereby any judgment shall be reversed*, are taken to have the same purport, as if it were said, whereby any judgment shall be annulled, or lose its force or effect; for it is plain, That the statute cannot intend that the judgment must be actually reversed by writ of error, because it speaks of stealing or carrying away, or avoiding of records, which makes it impossible that the judgment should be reversed at all, because no writ of error can remove a judgment which appears not. And it has been holden, That if *A. B.* be outlawed by the name of *A. C.* and afterwards the record be rased, and *A. B.* inserted, the offence is within the statute, because the record against *A. C.* is annulled, and the judgment prevented, which might have been given on a writ of error for this defect.

2 R. 3. 10. 11.
S. P. C. 36.
3 Inst. 73.

Sett. 6. Fourthly, If the offence were committed partly in one county and partly in another, but not so as to amount to a compleat offence within the statute in either, That the party cannot be indicted for a felony, because the counties cannot join in an indictment, and that which is done in one cannot be found in another, but that he may be indicted for a misprision in either county.

3 Inst. 72.
Conn. S. P. C.
44.

Sett. 7. Fifthly, That the act, by making those who are accessory before the fact principal felons, does not mean any way to favour those who are accessory after, but to leave them to the general construction of the law.

3 Inst. 73.

3 Inst. 72.
2 R. 3. 11.

Sett. 8. Sixthly, That by the last clause of the act, the justices of either bench have a concurrent authority, and that they which shall first enquire shall proceed; and that if the offence were committed in the county where the benches sit, they need no other commission; but if it were done in another county, that they must have a special commission: And if in London, that they shall have a commission in which the mayor shall be omitted, for the charters of the city, which require that he shall be a principal in every commission, extend not to such causes which are specially limited to particular judges.

Sett. 9. By 21 Jac. 1. c. 26. "It is made felony without the benefit of clergy, but not so as to corrupt the blood, to acknowledge or procure to be acknowledged, any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment in the name of any other person or persons not privy or consenting to the same.

2 Jon. 64.

Sett. 10. In the construction hereof it has been holden, That if a man personate another in the county of *A.* in putting in bail before a judge, and the bail be filed in the county

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of *B.* the trial shall be in the county of *A.* Also it seems the bare personating of bail before a judge is no felony, unless the bail be filed; † and if it be not filed the (a) acknowledging thereof in another name makes not felony, but a misdemeanor only. (1)

Contra in the report of the same case. 1 Ven. 301, 302. (a) 1 Hale 696.

(1) Two people put in bail in feigned names in the Common Pleas, and because there were no such persons, they could not be prosecuted for personating bail on this statute; but the court ordered them and the attorney to be set in the pillory, which was done accordingly. Strange 384.

Sec. 11. Also it is enacted by 4 & 5 Will. & Mar. c. 4. "That any person or persons who shall before any commissioner authorized to take bail, by virtue of the said statute, in actions depending in the courts of King's Bench, Common Pleas, or Exchequer, represent, or personate any other person or persons, whereby the person or persons so represented and personated, may be liable to the payment of any sum or sums of money, or debt, or damages to be recovered in the same suit or action, wherein such person or persons are represented and personated, as if they had really acknowledged and entered into the same, being lawfully convicted thereof, shall be adjudged felons."

4 Blac. Com. 123.

CHAPTER THE FORTY-SIXTH.

OF OFFENCES RELATING TO CATTLE.

BY 22 & 23 Car. 2. c. 7. it is made felony, "Maliciously, unlawfully, and willingly, to kill or destroy any horses, sheep, or other cattle of any person or persons whatsoever in the night-time, but liberty is given to the offender to avoid judgment of death, by chusing judgment of transportation for seven years; and any three justices of peace for the county, division, city, town corporate, or place, whereof one to be of the quorum, are authorized to enquire as well by the oaths of twelve lawful men of the same county, as by examination of witnesses upon oath, or by any lawful ways or means, which to them shall seem meet, of the said offences, and in order thereunto to issue out warrants, as well for the summoning of jurors, as for the apprehending of all persons, who shall or may be suspected thereof, and to take their examination touching the same, as also to cause all such other persons as to them shall seem likely to make discovery thereof, to appear before them, and to give information upon oath concerning their knowledge of the premises, so as no person so to be examined shall in any wise be proceeded against for any offence concerning which he shall be so examined as a witness, and

" shall upon such his examination make a true discovery of :
 " And if any person who shall be thought likely to make
 " such discovery, being summoned by the said justices, re-
 " fuse to appear, or to be examined as a witness, he may
 " be committed by the said justices to the county gaol, till
 " he shall submit to be examined. Provided, That no per-
 " son shall be questioned for any offence against the statute,
 " unless he be proceeded against within six months after the
 " offence committed."

† *Seet.* 2. And it is enacted by the Black Act, 9 Geo. 1. c. 22. That if any person or persons shall unlawfully and maliciously kill, maim, or wound any cattle; (1) or shall forcibly rescue any person in lawful custody for the same; or shall by gift, or promise of money, or other reward, procure any of the king's subjects to join him or them in such unlawful act; every person so offending shall suffer death, without the benefit of clergy. And by 27 Eliz. c. 13. the hundred are liable to the amount of 200 l.

For the current clause to which offenders against this act are liable, vid post. c. 49. s. 3 and it is at the option of the prosecutor in what court he will prosecute upon this act. Black.

(1) On an indictment upon this statute, for killing a mare and a *stee* colt, it was objected in arrest of judgment. First, That the word cattle did not necessarily include *mares, mares, and colts*. And Secondly, That the mare and colt were not averred to be cattle within the statute. The judges unanimously agreed, that, as the 22 & 23 Car. 2. c. 7. had made the offence of killing horses by night a single felony, the 9 Geo. 1. c. 22. was to be considered as an extension of that act, and the offender had judgment of death. 2 Black.; 1 Burn. 223.

† *Seet.* 3. And it is further enacted by 14 Geo. 2. c. 6. explained by 15 Geo. 2. c. 34. That whoever shall feloniously drive away, or in any other manner feloniously steal, one or more, sheep, bull, cow, (2) ox, steer, bullock, heifer, calf, or lamb, but no other cattle whatsoever; or shall wilfully kill the same with a felonious intent to steal the whole carcase, or any part thereof; or shall assist or aid to commit the said offence, shall suffer death without benefit of clergy.—And by par. 2. a reward of 10 l. shall be paid by the sheriff for taking and convicting the offenders.

(2) At Warwick summer assizes, 1774, Cooke was indicted upon this statute for stealing a *cow*, on the evidence it appeared to be a beast of the ox kind, called a *heifer*; never having had a calf. All the judges (absent: De Grey, C. J.) were of opinion, that the word heifer is mentioned in the act in contradistinction to a cow; and, therefore, that the evidence did not support the indictment. M.S.

† *Seet.* 4. And by the 37 Hen. 8. c. 6. whoever shall maliciously, unlawfully, and willingly cut out, or cause to be cut out the tongue or tongues of any tame beast or beasts of any other person or persons, the said beast then being in life, shall forfeit treble damages to the party grieved, by action of trespass, and ten pounds to the king, in the name of a fine. (3)

(3) By 9 Geo. 3. c. 39. s. 10. The crown is empowered to prevent the importation of cattle, in order to avoid the danger of introducing a contagious distemper. And by 21 Geo. 3. c. 67. Regulations and penalties are imposed to prevent the mischiefs which may arise from the improper driving of cattle through the streets within the bills of mortality. And for further particulars vide 18 Car. 2. c. 2. 20 Car. 2. c. 7. 32 Car. 2. c. 2. 5 Geo. 3. c. 10.

Sec. 5. But the practice of stealing horses, cows, &c. Preamble.
greatly increasing, owing to the facility with which they are
disposed of to persons who keep places for slaughtering: it
is enacted by the 26 Geo. 3. c. 71. "that no person shall
"use any place, for slaughtering any horse, mare, gelding,
"colt, filly, ass, mule, bull, ox, cow, heifer, calf, sheep, hog,
"goat, or other cattle, not be killed for butchers meat, with-
"out first taking out a licence, at the general quarter sessions;
"which shall only be granted upon a certificate, under the
"hands and seals of the minister and churchwardens, or over-
"seers, or the minister and two substantial householders of the
"parish, that the person to be licensed is fit to be trusted
"with such business: which licence in case of death, shall be
"effectual to the widow, or personal representative of such per-
"son until the then next ensuing general quarter sessions."

Persons keeping
a slaughter
house, to take
out a licence,
&c.

Sec. 6. "And every such licence shall be signed by the justices
"in sessions, and a copy entered in a book by the clerk of the
"peace, for every person to search.—And persons so licensed
"shall affix over the door where they carry on the business,
"THEIR NAMES, with the words LICENCED FOR SLAUGH-
"TERING HORSES, PURSUANT TO AN ACT PASSED IN THE
"TWENTY-SIXTH YEAR OF HIS MAJESTY KING GEORGE
"THE THIRD."

Persons licensed
to affix to their
houses the words
herein men-
tioned.

Sec. 7. "And every occupier of such licensed slaughtering
"house shall, six hours previous to the killing any cattle, not
"killed for butchers meat, and previous to the slaing any
"cattle, brought there dead, give notice, in writing, to the in-
"specter, that he may, take the height, age, colour, and par-
"ticular marks of every horse, mare, gelding, foal or filly, ass
"or mule, and the colour and particular marks of every cow,
"bull, heifer, ox, calf, sheep, hog, goat, or other cattle, brought
"alive or dead for the purposes aforesaid.—And no cattle shall
"be slaughtered, &c. but between eight in the morning and
"four in the evening, from *October to March*; and between
"six in the morning and eight in the evening, from *April to*
"*September*."

Previous notice
to be sent when
horses, &c. are
intended to be
slaughtered, to
the inspector,
who is to take
an account of
the beasts.

Times of slaugh-
tering, &c.

Sec. 8. And further, "that every person so licensed, shall
"enter the name, place of abode and profession of the owner
"and of the person who shall bring the same, and the reason
"why the same is brought, for the examination of the in-
"specter.—And such licensed person shall attend with such
"entry, before any one justice for the county, or place when
"required, and shall likewise produce the same at every quarter
"sessions."

Accounts to be
kept, by the
owners of
slaughtering
houses, of the
owners of the
cattle brought,
&c.

Sec. 9. And "that parishioners, intituled to chuse parish
"officers, shall, annually, or oftener, appoint one or more per-
"sons to inspect every such slaughtering house, and take such
"account there as before directed; and make an entry thereof
"for

Vestry to ap-
point inspectors

Inspectors duty. "for publick inspection. And the inspector shall affix over his door, HIS NAME, and INSPECTOR OF HOUSES AND PLACES FOR SLAUGHTERING HORSES.—In case such inspector have reason to believe, that such cattle, is in a serviceable state, or be stolen, or unlawfully come by, he shall prohibit the slaughtering for eight days; and cause an advertisement to be inserted in some publick newspaper circulated in the country, twice or oftener, unless the owner shall sooner claim the same, or otherwise satisfactorily inform the inspectors, that they sent the cattle, to be slaughtered.—The expence to be paid by the occupier of the slaughtering house, and on refusal, and conviction, on the oath of the inspector, before one justice, he shall forfeit double."

Inspectors may visit slaughtering houses at all times. *SECT. 10.* And, par. 6. "Every inspector in the day; and in the night, in the presence of a constable, may inspect any slaughtering house."

Persons bringing cattle refusing to give an account of themselves, &c. may be carried before a justice. *SECT. 11.* And par. 7. "If any person shall offer to sale, or bring any cattle to any such slaughtering house, and shall not be able, or refuse to give a satisfactory account how the same came into their possession; or if there shall be reason to suspect that such cattle are unlawfully obtained, he may be conveyed before a justice; and if such justice shall suspect that such cattle are unlawfully obtained, he shall commit such person, not exceeding six days, to be further examined; and if upon either examinations, such justices shall be satisfied, that such cattle are illegally obtained, the justice shall commit the offender to the common gaol or house of correction, to be dealt with according to law."

Persons slaughtering horses, &c. without licence, &c. guilty of felony. *SECT. 12.* "And if any person keeping such house, shall slaughter any cattle, other than for butchers meat, or shall steal any cattle, brought dead, without such licence, or giving notice as aforesaid, or shall kill, or slay the same, other than within the hours limited, or shall not delay slaughtering, according to the direction of such inspector, each person so offending shall be guilty of A FELONY, and punished by fine and imprisonment, and such corporal punishment, publick or private whipping, or shall be transported not exceeding seven years, as the court shall direct."

Persons destroying hides, &c. to be deemed guilty of misdemeanors. *SECT. 13.* "If any person keeping such house shall, immerse in lime, or any preparation thereof, or rub therewith, or with any other corrosive matter, or destroy or burn the hide or skins of any cattle by him slaughtered, killed, or slayed, or shall be guilty of any offence against this act, for which no punishment is expressly provided, such person shall be guilty of a MISDEMEANOR."

CHAPTER THE FORTY-SEVENTH.

OF OFFENCES BY PURVEYORS.

ANCIENTLY the king's court was supplied with necessaries from the ancient demesnes of the crown, which were manured for that purpose, and in respect thereof the tenants of those lands had many privileges, which they still enjoy; but this method being found to be troublesome and inconvenient, was by degrees disused, and afterwards the king used to appoint certain officers to buy in provisions for his household, who were called purveyors, and claimed many privileges by the prerogative of the crown, and seem to have had the pre-emption of all such victuals as were brought by any one to sell again.

2 Inst. 453.

Noy 101.

Stat. 2. By *magna charta*, chapter 21. "The king shall not take the timber of any person against his will, and by many subsequent statutes, several offences of purveyors were made felonies, as if they took things above the value of twelve pence against the will of the owner, without warrant, or without such appraisement as was directed by those statutes, or without paying for them, &c.

28 E. 1. c. 2.
36 E. 3. c. 2, 3,
4, 5, 6.
5 E. 3. c. 2.
2 Inst. 82.
Dalt. c. 107.
Crom. 48.
1 Bull. 96, 97.

Stat. 3. But these laws having been found by experience not to have sufficiently provided against the oppressions of persons employed for making provisions for the king's household, carriages, and other purveyance for his majesty, and several counties having found themselves obliged to submit to sundry rates and taxes, and compositions to redeem themselves from such vexations and oppressions, as it is recited by 12 Car. 2. c. 24. s. 12. it was enacted by the said statute, "That from thenceforth no sum or sums of money, or other thing shall be taken, raised, taxed, rated, imposed, paid, or levied, for or in regard of any provision, carriages, or purveyance for his majesty, his heirs or successors."

Moor 762.
770, 778.
Noy 101.

1 Hale 644.

Stat. 4. And it is farther enacted by the said statute, par. 13. "That no person or persons by any warrant, commission, or authority under the great seal, or otherwise by colour of buying or making provision or purveyance for his majesty, or any queen of England for the time being, or of any the children of any king or queen of England for the time being, or that shall be, or for his, their, or any of their household, shall take any timber, fuel, cattle, corn, grain, malt, hay, straw, victual, cart, carriage, or other thing whatsoever, of any the subjects of his majesty, his heirs or successors, without the free and full consent of the owner or

1 Comm. 287.
4 Comm. 116.

“ owners thereof, had and obtained without menace, or enforcement; nor shall summon, warn, take, use, or require any the said subjects to furnish or find any horses, oxen, or cattle, carts, ploughs, wains, or other carriages, for the use of his majesty, his heirs or successors, or of any queen of England, or of any child, or children of any of the kings or queens of England for the time being, for the carrying the goods of his majesty, his heirs or successors, or the said queens, or children, or any of them, without such full and free consent as aforesaid; any law, statute, custom, or usage to the contrary notwithstanding.”

4 Comm. 417,
432.

Sec. 5. And it is farther enacted, par. 14. “ That no pre-emption shall be allowed or claimed in the behalf of his majesty, or of any of his heirs or successors, or of any of the queens of England, or of any of the children of the royal family, for the time being, in market or out of market, but that it be free to all and every the subjects of his majesty, to sell, dispose, or employ his said goods to any other person or persons, as him listeth; any pretence of making provision or purveyance of victual, carriages or other thing for his majesty, his heirs, or successors, or of the said queens, or children, or any pretence of pre-emption in their, or any of their behalfs notwithstanding. And if any person or persons shall make provision or purveyance for his majesty, his heirs or successors, or any the queens, or children aforesaid, or impress, or take any such carriages, or other things aforesaid, on any pretence or colour of any warrant aforesaid, under the great seal, or otherwise, contrary to the intent hereof, it shall be lawful for the justices of peace, or such two or one of them as dwell near, and to the constables of such parish or village where such occasion shall happen, at the request of the party grieved, to commit, or cause to be committed, the party or parties so doing and offending, to gaol, till the next sessions, there to be indicted and proceeded against for the same, &c.”

1 Comm. 287.
4 Comm. 116,
417, 432.
Both these acts
are expiated, vide
11 & 12 Will. 3.
c. 13.

Sec. 6. But this absolute and universal restraint of all kinds of purveyance having been found by experience inconvenient, it was enacted by 13 & 14 Car. 2. c. 20. which has been often continued by subsequent statutes, that the officers of the navy may press carriages for the use of his majesty's navy and ordnance, according to the regulations prescribed by that statute, and the like was enacted by 1 Jac. 2. c. 10. in relation to the king's royal progresses, &c.

CHAPTER THE FORTY-EIGHTH.

OF OFFENCES BY SOLDIERS AND MARINERS:

OFFENCES by soldiers or mariners, made felony by statute, are of three kinds.—First, Wandering, without a testimonial.—Secondly, Departing from the king's service without licence!—Thirdly, Destroying a ship.

Stat. 1. The first of these offences depends upon *39 Eliz. c. 17.* by which it is enacted, "That all idle and wandering soldiers or marines, or idle persons which shall be wandering as soldiers or marines, shall settle themselves in some service, labour, or other lawful course of life, without wandering, or otherwise repair to the places where they were born, or to their dwelling places, if they have any, and there remain, betaking themselves to some lawful trade or course of life, as aforesaid; upon pain, That all persons offending contrary to this act, shall suffer as in case of felony, without clergy."

This sanguinary law, says Sir Will. Blackstone though in practice deservedly antiquated still remains a disgrace to our Statute Book.

Stat. 2. And it is farther enacted, "That every idle and wandering soldier or mariner, which, coming from his captain from the seas, or from beyond the seas, shall not have a testimonial under the hand of some one justice of the peace, of, or near, the place where he landed, setting down therein the place and time, where and when he landed, and the place of his dwelling or birth, unto which he is to pass as aforesaid, and a convenient time therein limited for his passage, or having such testimonial, shall wilfully exceed the time therein limited, above fourteen days: And also, as well every such idle and wandering soldier or mariner, as every other idle person wandering, as soldier or mariner, which shall at any time hereafter forge or counterfeit any such testimonial, or have with him or them any such testimonial forged, or counterfeited as aforesaid, knowing the same to be counterfeited or forged, in all these cases, every such act or acts to be felony, and the offenders to suffer, as aforesaid, without any benefit of clergy."

Stat. 3. And it is farther enacted, "That it shall be lawful for the justices of assizes, justices of gaol-delivery, and the justices of peace of every county, and all justices of peace in towns corporate, having authority to hear and determine felonies, to hear and determine all such offences in their general sessions, and to execute the offenders, which shall be convicted before them, as in cases of

“felony is accustomed, except some honest free holder, &c. will take such offender into his service for one whole year, and also be bound by recognizance of ten pounds, to keep the said person for one whole year, and bring him to the next sessions for the peace and gaol delivery next ensuing after the said year, and if any such person so retained, depart within the year, without the licence of him that so retained him, then, to be indicted, tried, and judged as a felon, and not to have the benefit of the clergy.”

Sec. 4. But it is provided by the said statute, “That if any such idle and wandering person, as aforesaid, shall happen to fall sick by the way, so that by reason of his weakness he cannot travel to his journey’s end within the time limited within his testimonial, no such person to be within the danger of this statute, so as he settle himself in some lawful course of life, as aforesaid, or repair as aforesaid to the place where he was born, or was last abiding, within convenient time after the recovery of his sickness, and there remain as aforesaid.”

Sec. 5. And it is farther provided by the said statute, “That if such soldier or mariner repairing to his place of birth, &c. cannot get work, he shall be set to work by two justices of peace.”

Sec. 6. And it is farther provided, “That if such soldier or mariner resort to some justice of the peace next adjoining to his place of landing, or to such his direct way home, and make known unto the said justice his poverty; that the said justice, upon perfect notice thereof had, may license the same soldier or mariner to pass the next and direct way to the place where he is to repair, and to limit him so much time only, as shall be necessary for his travel thither; and that in such case his licence being so made, and he pursuing the form of such his licence, shall and may, for his necessary relief in his travel, ask and take the relief that any person shall willingly give him.”

+ It is also enacted by 17 Geo. 2. c. 5. with an exception of the provisions of 39 Eliz. c. 17. “That all persons wandering abroad and begging, pretending to be soldiers, mariners, seafaringmen, shall be deemed rogues and vagabonds, and punished as the act directs, with whipping, imprisonment, &c.”

Sec. 7. The second offence of this kind, viz. That of departing from the king’s service without licence, depends upon several statutes. For it was enacted by 18 Hen. 6. c. 19. “That soldiers retained in the manner prescribed by that act, departing from their captains without licence, shall be guilty of felony;” but this statute is now of little use, because the method of retaining soldiers therein referred to, is disused.

2 Inst. 729.
4 Burn. 356.
4 Comm 165.

114 4 Burn,

2 Inst. 26.
6 Co. 27.
Co. Lit. 1.
Dalt. 107.
C. C.
Hut. 134.

Stat. 8. However by 7 Hen. 7. c. 1. and 3 Hen. 8. c. 5. still in force, "If any soldier being no captain, immediately retained with the king, who shall be in wages and retained, or take any preft to serve the king upon the sea, or upon the land beyond the sea, depart out of the king's service, without licence of his captain, he shall suffer as a felon, without the benefit of the clergy. And all justices of peace in every shire in England, where any such offenders be taken, have power to enquire of the said offences, and the same to hear and determine, as they may do of felony, trespasses, and of other offences expressed in the king's commission to them made, as though the said offences were done in the same shire."

3 Inst. 86.
Dalt. c. 107.
2 And. 151.
3 Mod. 124.
See also the other books above cited, and 1 Hale, 672, to 680.

Stat. 9. And by 2 Edw. 6. c. 2. "If any soldier serving the king in his wars, in any his dominions, or on the seas, or beyond the seas, or in Scotland, depart without licence of the lieutenant, or admiral, or captain, &c. with booty, or otherwise, being in the enemy's country, or elsewhere in the king's service, or out of any garrison where he shall be appointed to serve, he shall be adjudged a felon, and excluded from his clergy; and the justices of every shire where such offender shall be taken, may enquire of and determine the offence, &c."

3 Inst. 86.
6 Co. 67.
Vide 27 Geo. 2. c. 9. 21 Geo. 3. c. 65. s. 32. respecting the punishment of soldiers in the service of the East-India Company. And it is decided that a military officer in the service of the

East-India Company has not a right to resign his commission at all times, and under any circumstances whatsoever, whenever he pleases. 4 Burrow. 2421. By 29 Geo. 2. c. 17. subjects in the service of the French king, as officers or soldiers, are guilty of felony without clergy. V. also the annual acts for the punishment of mutiny and defection.

Stat. 10. The third offence of this kind, viz. That of destroying a ship, depends upon 22 & 23 Car. 2. c. 11. and 1 Ann. st. 2. c. 9. by which it is enacted, "That if any captain, master, mariner or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship to which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants that shall load goods thereon, he shall suffer as a felon, without the benefit of clergy, and if the offence were committed in the admiral's jurisdiction, shall be tried in the manner prescribed by 28 Hen. 8. c. 15."

+ *Stat.* 11. Also it is further enacted by 4 Geo. c. 12. "That if any owner of, or captain, master, mariner, or other officer belonging to any ship shall wilfully cast away, burn, or otherwise destroy the ship of which he is owner, or unto which he belongeth, or in any manner of wise procure the same to be done, to the prejudice of any person that shall underwrite any policy of insurance thereon, or of any merchant that shall load goods thereon, he shall suffer death."

Stat.

† *Stat. 12.* But by 11 Geo. 1. c. 29. s. 6. this clause is explained and the offenders are ousted of clergy. And it is further enacted, "That if any of the said offences be committed within the body of a county, the same shall be tried in the same manner as other felonies so committed. And if committed upon the high seas, the same shall be tried, &c. according to the directions of 28 Hen. 8. c. 15."

For the offences by masters and mariners amounting to piracy, vide 11 and 12. Will. 3. c. 7. Ante ch. 37. For the punishment of soldiers and seamen convicted of profane cursing and swearing, vide 19 Geo. 2. c. 21. 23 Geo. 2. c. 33. Ante ch. 6. s. 4. For inferior offences respecting wages and desertion, 2 Geo. 2. c. 36. 23 Geo. 2. c. 26. For the regulation of seamen wages under certain penalties, 31 Geo. 2. c. 10. And for the inflicting of soldiers, &c. 4 Burn 212.

CHAPTER THE FORTY-NINTH.

OF OFFENCES BY HUNTERS.

3 F.J.A. 2. c. 20.
21 Edw. 1. c.
762.
3 Inst. 76, 77.
Dalt. c. 29.
1 Hale 656 to
659.
2 Roll. 120, 113.
Co. Lit
2 Burn

IT is recited by 1 Hen. 7. c. 7. "That many great outrages, murders, insurrections and rebellions had often been occasioned by persons in great numbers with painted faces, visors, and otherwise disguised, and riotously, and in manner of war arrayed, hunting as well by night as by day;" and thereupon it is enacted, "That as often as information shall be made of any such unlawful hunttings by night, or with painted faces, to any of the king's council, or to any justice of peace of the county, of any person suspected thereof, any of the same council, or justices, to whom such information shall be made, may make a warrant to arrest such person, and may also examine him of the said hunting, and of the said doers in that behalf; and if the same person wilfully conceal the said hunttings, or any person with him defective therein, that then the same concealment be felony; and if he then confess the truth, and all that he shall be examined of, and knoweth in that behalf, that then the said offences of hunttings be against the king but trespasss fineable, by reason of the same confession, at the next general sessions of the peace to be holden in the same county, by the king's justices of the same sessions, there to be tried. And if rescous or disobedience be made to any person, having authority to do execution or justice by any such warrant, by any person, the which so should be arrested, so that the execution of the same warrant thereby be not had, that then the same rescous and disobedience, be felony; and if any person or persons shall be convicted of any such hunttings, with painted faces, visors, or otherwise disguised, to the intent

"they

“ they should not be known, or of unlawful hunting in time of night, that then the same person or persons so convicted, to have like punishment, as he or they should have, if he or they were convicted of felony.”

† *Secl. 2.* It is also further enacted by 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 22. “ That if any person or persons being armed with swords, fire arms, or other offensive weapons, and having his or their faces blacked, or being otherwise disguised, shall appear in any forest, chase, park, paddock, or grounds inclosed with any wall, pale, or other fence, wherein any deer have been, or shall be usually kept;—or in any high road, open heath, common, or down,—or shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer—or unlawfully rob any warren (a) or place where conies or hares are usually kept:—Or shall unlawfully steal or take away any fish out of any pond or river.—Or if any person or persons (*whether armed and disguised or not*) shall unlawfully and wilfully hunt, wound, kill, destroy, or steal any red or fallow deer, fed or kept in any places in any of the king’s forests or chases, which are or shall be inclosed with pales, rails, or other fences, or in any park, paddock, or grounds inclosed; where any deer have been or shall be usually kept; (+) (1) (2) (3) (4) (5);—or shall forcibly rescue any person being lawfully in custody of any officer or other person for any the offences before mentioned;—or, if any person or persons shall by gift or promise of money, or other reward, procure any of his majesty’s subjects to join him or them in any such unlawful act; every person so offending, being thereof lawfully convicted (in any county in England) shall suffer death without benefit of clergy—but not to work corruption of blood, nor forfeiture of land or goods.”

N.B. The several facts mentioned in this act are not to be taken as being parts of the same offences but are every of them several offences. Lord Hardwicke, B.R. H. 219.

(a) C. Eliz. 548. C. Jac. 195. 2 Bac. Ab. 614

(+) For offences relating to the destruction of fish, vide ch. 58, Appendix 3.
(1) For offences relating to cattle, vide ch. 46.
(2) For destroying of trees, vide ch. 58, app. 1.
(3) For offences by burners of houses, &c vide ch. 58, app. 4.

(4) For shooting at another, vide ch. 58, app. 5. (5) For sending threatening letters, vide ch. 58, app. 5.

† *Secl. 3.* And, “ For the more easy and speedy bringing the offenders to justice,” it is also enacted by the said statute, “ That if any person or persons shall be charged with being guilty of any of the offences aforesaid, before any two or more of his majesty’s justices of the peace of the county where the offence shall be committed, by information of one or more credible persons, on oath by them to be subscribed; the said justices shall forthwith certify under their hands and seals, and return such information to one of the principal secretaries of state; who shall lay the same, as soon as conveniently may be, before the king in his privy council; whereupon it shall and may be lawful “ for

The surrender clause.
For constructions upon a similar clause in the Smuggling act, vide the case of John Harvey, Foster 51. And post, ch. 53, Appendix 7. sect. 2.

“ for his majesty, his heirs or successors, to make his order in
 “ said privy council, thereby requiring and commanding such
 “ offender to surrender himself within the space of forty days
 “ to any of the justices of the King’s Bench, or to any one
 “ justice of the peace, to the end that he may be forthcoming
 “ to answer the offence wherewith he shall so stand charged,
 “ according to the due course of law; which order shall be
 “ printed and published in the next London gazette, and shall
 “ be forthwith transmitted to the sheriff of the county where
 “ the offence shall be committed, and shall within six days
 “ after the receipt thereof, be proclaimed by him or his offi-
 “ cers, between the hours of ten in the morning and two in
 “ the afternoon, in the market places, upon the respective
 “ market days, of two market towns in the same county, near
 “ the place where such offence shall have been committed;
 “ and a true copy of such order shall be affixed upon some
 “ public market place in such market towns; and in case such
 “ offender shall not surrender himself pursuant to such order
 “ of his majesty, his heirs or successors, to be made in coun-
 “ cil as aforesaid, he shall, from the day appointed for his
 “ surrender as aforesaid, be adjudged, deemed and taken to
 “ be convicted and attainted of felony, and shall suffer pains
 “ of death, as in case of a person convicted and attainted by
 “ verdict and judgment of felony, without benefit of clergy;
 “ and the court of King’s Bench, or judges of oyer and ter-
 “ miner, &c. for the county where the offence is sworn in
 “ such information to have been committed, upon pro-
 “ ducing to them such order in council, under the seal of the
 “ said council, to award execution against such offender in
 “ such manner as if he had been convicted and attainted in
 “ the said court of King’s Bench, or before such justices of
 “ oyer and terminer, or general gaol delivery respectively.”

† *Sec. 4.* And it is further enacted, par. 5. “ That who-
 “ ever shall, after the time appointed, as aforesaid, for the
 “ surrender of any person so charged upon oath, with any
 “ the offences aforesaid, be expired, conceal, abet, or suc-
 “ cour such person, knowing him to have been so charged, as
 “ aforesaid, and to have been required to surrender himself by
 “ such order, being lawfully convicted thereof, shall suffer
 “ death without benefit of clergy.”

† *Sec. 5.* But this shall not hinder any judge, justice of
 the peace, magistrate, officer, or minister of justice, from
 apprehending or securing such offender, by the ordinary
 course of law: and if he be taken and secured before the time
 of surrender, he shall have his trial by due course of law.

For the instances in which the hundred shall be liable to the assessment of 200*l.* and for the previous proceedings which are necessary to entitle the party to recover, vide 7, 8, 9, and 10 sections of the act, and Douglas 704. For the mode of apprehending an offender, vide Bk. 2. c. 13. s. 28.

† *Stat.* 6. It is enacted by 5 Geo. 1. c. 28. "That who-
"ever shall enter into any park, paddock, or other inclosed
"ground where deer are usually kept, and wilfully wound or
"kill any red or fallow deer therein, without licence from
"the owner or keeper, or shall aid or assist in the commit-
"ting of any such offence, shall be transported for seven
"years.

† *Stat.* 7. But by 16 Geo. 3. c. 30. (which repeals, by
name, all former statutes, except the statute above menti-
oned, as far as they relate to deer) it is further enacted,
"That whoeyer shall course or hunt, or shall take in any
"slip, noose, toil, or snare, or shall kill wound or destroy,
"or shall shoot at, or otherwise attempt to kill, wound, or
"destroy,—or shall carry away any red or fallow deer, in any
"forest, chase, purlieu, or ancient walk, whether inclosed
"or not, or in any inclosed park, paddock, wood, or other
"inclosed ground where deer are, have been or shall be usu-
ally kept, without the consent of the owner, or without
beci otherwise duly authorised; or shall be aiding, abet-
ting, or assisting therein or thereunto; every person so of-
fending, by coursing, hunting, shooting at, or otherwise
attempting to kill, wound, or destroy; or by aiding there-
in or thereunto, shall forfeit for every such offence twenty
pounds.—And every person so offending by killing, wound-
ing, or destroying, or by taking in any slip, noose, toil,
or snare, or by carrying away, or by aiding therein re-
spectively, shall for every deer so wounded, killed, destroy-
ed, taken, or carried away forfeit thirty pounds.—And if
the offender in any of the cases aforesaid, shall be a keeper
of, or person in any manner intrusted with the custody or
care of deer in the forest, chase, purlieu, ancient walk, or
inclosed park, paddock, or wood, or other inclosed place
where the offence shall be committed, every such offend-
er shall forfeit double the penalty herein inflicted on other
offenders.—And whoever after having been convicted of
any of the aforesaid offences, shall offend a second time,
such second offence, whether it be the same as the first
offence, or be any other of the aforesaid offences, shall
be deemed felony, and the person guilty thereof, on con-
viction by indictment, shall be transported for seven years.
—And if any offender who hath been convicted under any
former statute now in force for hunting and killing deer,
&c. shall again commit any of the offences abovemention-
ed, he shall be adjudged to have committed a second of-
fence, under the provisions and penalties of this act."—
And, "For the more easy bringing such offenders to pu-
nishment, the justice before whom any person shall be con-
victed for the first time, shall transmit such conviction un-
der his hand and seal to the next quarter-sessions, to be
" filed

Holt 214, 215.
Carth. 408, 509.
Strange 44, 263.
316
10 Mod. 248,
341, 378.
Farres. 129, 134.
Salk. 542.
C. Car. 340.
Seff. Caf. 346.
Gilb. Caf. 237.

The murder r
nishment: infl
ed by this act
has been thought
a virtu' repeal
of the punish-
ment inflicted by
the black act
above recited.
O. B. 1784,
1071.

" filed among the records, by the clerk of the peace, which;
 " or a true copy thereof, certified and subscribed by the said
 " clerk, shall be sufficient evidence of the conviction for the
 " first offence."

† *Stat.* 8. It is also enacted, par. 4. " That any one
 " justice, on complaint of suspicion, on oath, shall, by war-
 " rant, cause the house of the person suspected to be searched.
 " and if any red or fallow deer, which shall have been un-
 " lawfully killed, or the head, skin, or other part thereof,
 " or any slip, noose, toil, snare, or other engine for the
 " unlawful taking of deer, shall be found, to cause the same and
 " such person so having possession; or in whose dwelling-
 " house, out-house, garden, or other place the same shall
 " be found, to be brought before any justice having juris-
 " diction, and if such person shall not produce before such
 " justice the party of whom he received the same, or satisfy
 " such justice that he came lawfully by such deer, or the
 " head, skin, or other part thereof, or had a lawful occasion
 " for such noose, slip, toil, snare or other engine, and did
 " not keep the same for any unlawful purpose, he shall for-
 " feit not exceeding 30*l.* nor less than 10*l.* at the dis-
 " cretion of such justice."

And by par. 5. " If the person in whose possession the same
 " shall be found shall not under the provisions aforesaid, be
 " liable to conviction, any justice having jurisdiction may
 " summon before him every person through whose hand
 " such deer, &c. &c. shall appear, upon the evidence gi-
 " ven to have passed, and if the person from whom such
 " deer, &c. &c. shall appear to have been first received,
 " or who having had possession thereof shall not give proof
 " to the satisfaction of such justice that he came law-
 " fully by the same, such person shall, on every con-
 " viction, forfeit not exceeding 30*l.* nor less than 10*l.*"

And by par. 6. " If on the search, by warrant, no deer,
 " &c. shall be found, and it shall appear on the oath of one
 " witness that any person hath, or hath had any such deer,
 " &c. &c. in his possession, and shall be reasonably sus-
 " pected to have come dishonestly or unlawfully thereby,
 " every such person, and all others through whose hands the
 " same shall appear to have passed under the like suspicion, may
 " be proceeded against, as if such deer, &c. &c. had been
 " found in the possession, house, out-house, garden, or place
 " of such person, on search by warrant as aforesaid."

Stat. 9. And it is further enacted par. 7. " That who-
 " ever shall lay snares or other engines for the purpose of taking
 " or killing deer, within or upon any forest, &c. or in the
 " ring, or outer-fence, or bank, dividing the same from the
 " adjoining lands;—or in any inclosed park, &c. shall, for
 " the first offence, forfeit not exceeding 10*l.* nor less than
 " 5*l.*"

By the game laws,
 in forests, the
 game of a forest
 doth pass. Dyar
 169.

“ 5 l. and for every other offence not exceeding 20 l. nor
“ less than 10 l.”

SECT. 40. And it is further enacted by par. 9. “ That if any
“ person carrying any gun or other fire-arms, or any sword,
“ staff, or other offensive weapon, shall come into any fo-
“ rest, chase, purlieu, or ancient walk, — or into any inclosed
“ park, paddock, wood, or into any other ground where deer
“ are usually kept, be the same inclosed or not inclosed, with
“ an intent unlawfully to shoot at, course, or hunt, or to
“ take in any slip, noose, toil, snare, or other engine, or
“ to kill, wound, destroy or take away, any red or fallow
“ deer, it shall be lawful for every ranger or keeper, or per-
“ son intrusted with the care of such deer, to seize and
“ take from such person, in and upon such forest, chase,
“ purlieu, ancient walk, park, paddock, wood, or other ground,
“ to and for the use of the owners thereof, respectively, all such
“ guns, fire-arms, slips, nooses, toils, snares, or other
“ engines; and all dogs there brought for coursing deer, in
“ the same and like manner as game-keepers of manors are
“ empowered by law within their respective manors, to seize
“ and take dogs, nets, or other engines in the custody of per-
“ sons not qualified by the laws to keep the same. And if any
“ such person shall there unlawfully beat, or wound any ran-
“ ger or keeper, or his or their servants, or assistants, in
“ the execution of his or their offices, or shall attempt to rescue
“ any person in the lawful custody of any such ranger, keeper,
“ servant, or assistant, every person so offending on con-
“ viction by indictment, shall be transported for seven years.”

Transportation.

Dogs and en-
gines may be
seized.

CHAPTER THE FIFTIETH.

OF OFFENCES BY DESTROYING FENCES, TURNPIKE-GATES, AND BRIDGES.

(F E N C E S .)

† IT is enacted by 13. Edw. 1. st. 1. c. 46. “ That
“ where sometime it chanceth that one having
right to approve, doth then levy a dyke or an hedge,
and some by night, or at another season, when they suppose
not to be espied, do overthrow the hedge or dyke, and it
cannot be known by verdict of the affize or jury who did
overthrow the hedge or dyke, and men of the towns near
will not indict such as be guilty of the fact, the towns near
adjoining shall be distrained to levy the hedge or dyke at
their own cost, and to yield damages.” — And by 3 & 4
Edw. 6. c. 6. such person as shall bring an affize thereupon,
“ and

Vide a critical
commentar
on this act,
Inst. 473.
also cites upon
it, Skinner 93.
C. Car. 281.
440, 520.
Dyer 47, 316,
319.
4 Co. 38.
11 Co. 74.
1 Roll. 365.

“ and have judgment to recover, shall have his damages trebled, by the judgment of the court.”

† *Stat.* 2. And it is farther enacted by 6 Geo. 1. c. 16. “ That whoever shall break down, throw down, level, or destroy any hedges, gates, posts, stiles, railing, walls, fences, dykes, ditches, banks, or other inclosures of such woods, wood-grounds, parks, chases, or coppices, plantations, timber trees, fruit or other trees, thorns or quicksets, shall by 6 Geo. 1. s. 2. c. 48. be committed to the house of correction for three months, and where there are no houses of correction, to any other prison of the county or place for four months, and whipped, and on conviction, by two justices in open sessions; and such lords of manors, owners and proprietors of the same, that is, are, or shall be damaged thereby, shall have the remedy and satisfaction from the adjoining parishes and places as is given by the above recited act of 13 Edw. the First.”

For the mode in which the justices are directed to proceed, vide the act, and ante ch. 49.

† *Stat.* 3. And it is further enacted by 16 Geo. 3. c. 30. s. 8. “ Whoever shall wilfully pull down or destroy, or cause to be wilfully pulled down or destroyed, the pale or pales, or any part of the walls of any forest, chace, purlieu, ancient walk, park, paddock, wood, or other ground where any red or fallow deer shall be then kept, without the consent of the owner, or person chiefly intrusted with the custody thereof, or being otherwise duly authorised, shall forfeit and pay the sum of thirty pounds, on information upon oath before one justice, by one witness, &c. and whoever having been convicted shall offend a second time, shall on conviction by indictment, be transported for seven years, provided the prosecutions be within six months.”

† *Stat.* 4. By 9 Geo. 3. c. 29. s. 3. “ Whoever shall wilfully or maliciously demolish, pull down or otherwise destroy or damage any fence made for dividing or inclosing any common, waste, or other lands or grounds in pursuance of any act of parliament, or shall cause or procure the same to be done, he shall be guilty of felony, and transported for seven years. Prosecution to be commenced in 18 months after the offence committed.”

(TURNPIKE - G A T E S .)

† *Stat.* 5. It is enacted by 1 Geo. 2. s. 2. c. 19. “ That if any person or persons shall, either by day or night, wilfully and maliciously break down, cut down, pluck up, throw down, level, or otherwise destroy any turnpike-gate, any posts, rails, wall, or other fence, belonging to any such turnpike-gate erected to prevent passengers from passing by without paying the toll directed to be paid by any act
“ of

Vide 13 Edw. 2. s. 1. c. 46.
2 Geo. 1. c. 2.
c. 48.
6 Geo. 1. c. 16.
4 Comm. 144.

“ of parliament, such offender, on the oath of one witness, before two justices, or at sessions, shall be sent to the common gaol or house of correction, to hard labour, for three months, and be once publicly whipped.”

† And it is farther enacted by the said statute, 1 Geo. 1. c. 19. and by 5 Geo. 2. c. 33. “ That on conviction of the said offence, by indictment before justices of assize, oyer and terminer, or gaol delivery for the county, &c. the offender shall be transported for seven years; and that if such offender so convicted, commit any of the offences aforesaid a second time, or if any person or persons shall either by day or night, wilfully and maliciously pull down or demolish any house or houses, erected for the use of any turnpike-gates, such offender, on conviction by indictment, before justices of assize, or gaol delivery, shall be guilty of felony, and transported for seven years. Provided, in both cases, the prosecution be within six months.”

† *Seet.* 6. It is also enacted by 5 Geo. 2. c. 33. That Vide B. 2. c. 13.
t. c. transporta- if such offender shall return from transportation, as aforesaid, he shall suffer death without clergy.

† *Seet.* 7. And it is also enacted by 8 Geo. 2. c. 20. N. B. The 27
Geo. 2. c. 16.
makes 5 Geo. 2.
c. 33. 8 Geo.
2. c. 20. per-
petual. “ That whoever shall be guilty of the offences abovementioned, or if any person or persons shall destroy, &c. any chain, bar, or other fence or fences belonging to any such turnpike-gate or gates as aforesaid, or any other chain, bar, or fence of any kind whatsoever, set up or erected to prevent passengers from passing without paying toll by act of parliament, or shall forcibly rescue any person or persons, being lawfully in custody of any officer or other person for any of the offences before mentioned, such offender shall suffer death without clergy—*Vide* further provisions by this act.”

† *Seet.* 8. By 13 Geo. 3. c. 84. s. 42. “ If any person or persons shall commit any of the offences aforesaid, or 7 Geo. 3. c. 40. destroy any crane, machine or engine made or erected on any turnpike road, by authority of parliament, for weighing waggons, carts, or carriages, or shall forcibly rescue, &c. such offender shall be transported for seven years, or committed to prison, not exceeding three years, at the discretion of the court; and unless the offender be convicted within twelve months, the hundred shall make satisfaction for the damages done.”

(B R I D G E S .)

† *Seet.* 9. It is enacted by 9 Geo. 1. c. 29. s. 6. for preventing the wilful and malicious damaging or destroying Westminster-bridge, or any part thereof, “ That if any person or And the same is
enacted by 31
Geo. 2. c. 10.
s. 6. respecting persons

London bridge, "persons shall wilfully and maliciously blow up, pull down, or destroy the said bridge, or any part thereof, or attempt to do, or unlawfully and without authority remove or take away any works thereto belonging, or in any wise direct or procure the same to be done, whereby the said bridge, or the works thereof may be damaged, or the lives of the passengers endangered; such offender or offenders shall be adjudged guilty of felony, and suffer death *without* benefit of clergy." By 24 Geo. 2. c. 36. of Ribble bridge. By 28 Geo. 2. c. 45. of Sandwich bridge. By 29 Geo. 2. c. 36. of Blackfriars' bridge. By 29 Geo. 2. c. 73. of Utle bridge. By 3 Geo. 2. c. 20. of Jeremiah's Ferry. By 31 Geo. 2. c. 63. and 31 Geo. 2. c. 48. of Old Burston bridge, and by 31 Geo. 2. c. 59. of Trent bridge; is made single felony, and *without* the benefit of clergy.

CHAPTER THE FIFTY-FIRST.

OF OFFENCES BY GAOLERS.

BY 14 Edw. 3. c. 10. "If any keeper of a prison, or under-keeper, by too great dures of imprisonment, and by pain, make any prisoner that he hath in his ward, to become an appellor against his will, he is guilty of felony." And it is said to be no way material, whether the approvement be true or false, or whether the appellee be acquitted or condemned; but at law this offence was esteemed a misprison only, unless the appellee were hanged by reason of the appeal.

Gaolers, as well *de facto* as *de jure*, are liable to attachment for contempt of court, and to fines, imprisonment, and forfeiture of office for gross and culpable abuses; as in treating criminals with barbarity, extorting money, not making lawful discharge, or suffering them to escape. 4 Ed. 1. c. 10. 2 Inst. 43, 53, 381. Co. lit. 233. 4 Co. 44. 9 Co. 45. Ray. 216. Lev. 71. 2 Hawk. 151. 3 Mod. 125. And if death be the consequence of their harsh treatment, it is felony without benefit of clergy. 3 Inst. 91. For 321. By the 3 Stat. 7. they must certify the names of their prisoners at every good delivery, in order to be taken away. By 19 Hen. 7. c. 10. they are liable to heavy fines for suffering the escape of prisoners committed for suspicion of high or petit treason. 12 Mod. 226. By 22 and 23 Car. 2. c. 19. debtors and creditors are to be separately lodged on forfeiture of office and treble damages. By 8 and 9 Will. 1. c. 27. to suffer an escape by bribery, gaolers lose of office, and disability for ever. 2 Inst. 43. 3 Lev. 238. Ray. 216. By 3 Geo. 1. c. 15. they are restrained from purchasing the office, penalty 500*l.* &c. By 9 Geo. 1. c. 22. 11 Geo. 1. c. 22. to neglect or refuse to execute process in the manner directed by the act, 200*l.* &c. By 5 Geo. 2. c. 30. to suffer a bankrupt to escape gaol. By 2 Geo. 2. c. 22. and 21 Geo. 2. c. 33. to carry a prisoner's debt to gaol against his will within 24 hours after he is taken, to exact any gratuity from, or to force any expense upon him, to furnish his bedding, apparel, &c. or to refuse him or his friends a copy of the clauses of this act, &c. incurs an additional penalty of 50*l.* and the offender may be indicted for the misfeasance. By 24 Geo. 2. c. 40. to permit spirituous liquors to be sold in the gaol. By 27 Geo. 2. c. 17. the king's bench is vested in the crown, and the marshal made liable, &c. By 34 Geo. 2. gaolers guilty of extortion may be punished in a summary way, and for disobeying the injunctions of the act forfeit 20*l.* and treble costs. By 14 Geo. 3. c. 59. to disobey an order of justices made pursuant to the act is liable to fine at the discretion of the judges of assize, or the justices in sessions. See also 11 and 12 Will. 3. c. 19. 24 Geo. 3. c. 54. and 47. and 3 Mod. 123. 11 Mod. 51, 79. 80. 12 Mod. 227. 2 Rol. Ab. 76. Jenk. 23. For the legs of gaolers, vide 2 Geo. 2. c. 22. 3 Geo. 2. c. 27. 8 Geo. 2. c. 24. 21 Geo. 2. c. 33. 32 Geo. 2. c. 28.

CHAPTER THE FIFTY-SECOND.

OF OFFENCES BY TRANSPORTERS
OF SHEEP OR WOOL.

BY some old statutes, and 13 & 14 Car. 2. c. 18. the exportation of wool was made felony; but by 7 & 8 ^{3 Inst. 95, 96.} Will. 3. c. 28. it is reduced to a misdemeanor only, and ^{4 Comm. 154.} it is subjected to severe penalties by many late statutes.

Sec. 2. It is enacted by 8 Eliz. c. 3. "That no person or persons shall bring, deliver, send, receive, or take, or procure to be brought, delivered, sent, or received into any ship or bottom, any rams, sheep or lambs, or any manner of other kind of sheep, being alive, to be carried and conveyed out of this realm of England, Wales, or Ireland, or out of any of the king's dominions, on pain that every such person or persons, their aiders, abettors, procurers and comforters, shall for the first offence forfeit all his goods for ever, whereof the one moiety shall be to the king, the other moiety to him that will sue for the same." And further, "That every such offender shall suffer imprisonment by the space of one whole year, without bail or mainprize, and at the year's end, shall in some open market-town, in the fulness of the market, on the market-day, have his left hand cut off, and that to be nailed up, in the openest place of such market; and that every person or persons afterwards offending against this statute, shall be adjudged a felon, &c."

+ *Sec. 3.* It is enacted by 22 Car. 2. c. 32. "That whoever shall export, or cause to be exported any sheep or wool whatsoever; or pack or load, or cause to be packed or loaded upon any horse, cart or other carriage; or load on board, or cause to be loaded on board any ship or other vessel, any sheep or wool, whatsoever, to the intent and purpose to export, or cause the same to be exported, shall forfeit the same, and twenty shillings for every sheep, and three shillings for every pound of wool. And the owners of the ship, knowing such offence, shall forfeit all their interest therein, with the apparel and furniture thereto belonging. And the master and mariners knowing thereof, and willingly aiding in such offence, shall forfeit all their goods and chattels, and have imprisonment for three months. And if any merchant or other person who shall be guilty, shall be disabled to sue in law. And by 9 & 10 Will. 3. c. 40. s. 9. prosecutions may be com- ^{Vide 6 Geo. 1. c. 21. 11 Geo. 2. c. 22. s. 1. by which the said offences are indemnified.} ^{Vide 13 and 14 Car. 2. c. 18. s. 7. for the penalty of pressing wool into packages, and laying it in places convenient for exportation.}

“menced by the informer within one year, and by the crown within three years after the offence committed.”

† *Stat.* 4. Also, by 7 & 8 Will. 3. c. 28. s. 10. “Whoever shall be aiding in exporting any wool out of this realm shall suffer three years imprisonment, and the owner and aider shall pay treble the value of what the inhabitants shall be liable to, (vide s. 9.) as also treble costs of suit.”

† *Stat.* 5. And it is also enacted by 4 Geo. 1. c. 11. “That whoever shall be in prison for want of sufficient bail for the unlawful exportation of wool, or by 12 Geo. 2. c. 21. s. 27. for aiding or abetting therein, and shall refuse to appear or plead to a declaration or information to be delivered to such person or persons, or to the gaoler, keeper, or turnkey of the prison at the prison for the said offence, by the space of one term, judgment shall be entered against him by default, and in case judgment shall be so obtained, or by verdict or otherwise, and the defendant shall not pay the sum recovered for the said offence within three months after entering up of such judgment, the court before whom such judgment shall be obtained, shall by order of court, cause such offender to be transported for seven years, and if he return before the expiration thereof, he shall suffer death without clergy.

† *Stat.* 6. And it is further enacted by 12 Geo. 2. c. 21. s. 25, 26. “that whoever shall offer or promise to give any bribe to an officer of the customs, excise or salt, to connive at or permit, the transportation or the concealment of any wool, or the removing thereof contrary to this act, or any other made against the transportation thereof; or to do, conceal, or connive at any other act whereby any of the provisions made by this or any other law, as aforesaid, may be evaded or broken, shall forfeit, whether the offer or promise were accepted or not, the sum of three hundred pounds to the informer.— And it is further enacted, par. 26. that if any officer of the customs, excise or salt, or any other person who shall act in their aid or assistance, in putting this act in execution, shall be hindered, opposed, obstructed, molested, wounded or beaten, in seizing any wool, the offenders, their aiders and abettors, or any other person or persons whatsoever being armed with offensive arms or weapons, or wearing any vizard, mask, or other disguise, who shall rescue, or attempt to rescue any wool which shall be seized by any officers as aforesaid, shall be transported for any term not exceeding seven years, as the court shall think fit.

Continued by 11
Geo. 3. c. 51.

† *Stat.* 7. Also it is further enacted by 19 Geo. 2. c. 34. s. 6. “That if any persons armed, to the number of three or
“more

“ more shall be assembled to assist in the illegal exportation
 “ of wool prohibited to be exported, or in carrying of wool
 “ in order to exportation, or in rescuing the same after seiz-
 “ ure; or in rescuing an offender herein, or preventing his
 “ being apprehended; or shall be aiding in any of the pre-
 “ mises; or if any person shall have his face disguised when
 “ passing with such goods, or shall forcibly hinder or assault
 “ any officer in seizing the same, or dangerously wound any
 “ such in attempting to go on board any vessel, or shoot at
 “ or wound him when on board in the execution of his office;
 “ shall be guilty of felony without benefit of clergy.”

N. B. There are several other felonies in this act against smugglers, for which vide appendix the sixth.

4 Burn. 418, for a full account of this title.

CHAPTER THE FIFTY-THIRD.

OF OFFENCES BY SERVANTS.

IT is recited by 33 Hen. 6. c. 8. “ That divers household-
 servants, as well of lords, as of other persons of good
 degree, had then of late, shortly after the death of their
 said lords and masters, violently and riotously taken and
 spoiled the goods which were of their said lords and masters
 at the time of their death, and the same distributed among
 themselves;” and thereupon it is enacted, “ That after
 “ information made to the chancellor by the executors of any
 “ such person, or two of them, of such riot, taking, and
 “ spoil; the chancellor, by the advice of the two chief justices,
 “ and chief baron, or two of them, may make out writs to
 “ such sheriffs as shall be thought necessary, commanding
 “ them to make such proclamation, as by the said statute is
 “ directed, for the offenders to appear in the King’s Bench
 “ at such a day, whereupon, if they make default, they shall
 “ be attainted of felony; but if they appear, they shall be
 “ committed or bailed, till they have answered the said exe-
 “ cutors in such actions, which the said executors will de-
 “ clare against them, or any of them, for the riot, taking,
 “ and spoiling aforesaid.”

Ante 91.
 1 Hale 667.
 4 Burn 118.
 This was a process much in use in case of great offences, especially about this king’s reign, to convict men sometimes in civil offences, sometimes in cases criminal upon default of appearance, at the return of the proclamation.
 1 Hale 654.
 3 Inst. 104.

† By 6 Ann c. 31. “ If any menial or other servant, through
 “ negligence or carelessness shall fire, or cause to be fired any
 “ dwelling house or out-house, they shall forfeit 100l. on
 “ conviction by one witness, before one justice, or suffer
 “ eighteen months imprisonment, &c.”

Ld. Ray. 99.

See also 12 Geo. 3. c. 73. s. 35. 14 Geo. 3. c. 78. s. 84. And for offences by servants in particular branches of trade, vide 4 Burn 118.

CHAPTER THE FIFTY-FOURTH.

OF OFFENCES BY EGYPTIANS.

BY 1 & 2 Ph. & Mar. c. 4. "All outlandish persons, 3 Inst. 102.
 "called Egyptians, being of the age of thirteen years, Vide 22 Hen. 8.
 "who shall be transported into this realm of England or Wales, c. 10.
 "and continue within the same by the space of one month, The 5 Eliz. c.
 "shall forfeit forty pounds, &c.—" And by 17 Geo. 2. c. 5. 20, recited in
 "All persons pretending to be gypsies, or wandering in the the former edi-
 "habit or form of Egyptians shall be deemed rogues and va- tion, is repealed
 "gabonds, and suffer corporal punishment and imprisonment, by 23 Geo. 2.
 "in the manner the act directs." c. 51, as a law
 "of excessive lev- of excessive lev-
 "Comm. 4. and rity, vide 4
 "for the history of . extraordinary class of people, 4 Comm. 165.

CHAPTER THE FIFTY-FIFTH.

OF OFFENCES BY CUTTERS OF POW-DIKE, AND DESTROYERS OF SLUICES, &c. ON NAVIGABLE RIVERS.

It is recited by 22 Hen. 8. c. 11. which was repealed
 by 1 Edw. 6. and revived by 2 & 3 Ph. & Mar. c. 19.
 4 Comm. 245. "That divers persons had maliciously at sundry times cut
 down, and broken up, divers parts of the dike, called
 the new Pow-dike, in Marshland, in the county of
 Norfolk, and the Proken-dike, otherwise called Oldfelde-
 dike, by Marshland, in the Isle of Ely, in the county of
 Cambridge: By reason whereof the ground within the coun-
 try of Marshland in the counties aforesaid, had been many
 times drowned; and the inhabitants had not only been
 put to great charges and expences, but also had lost
 much cattle, and also many people had been drowned in
 their beds." And thereupon it is enacted, "That every
 "such perverse and malicious cutting down, and breaking up
 "of, any part or parts of the said dikes, or of any other bank,
 "being parcel of the rind and uttermost part of the said coun-
 "try of Marshland, by any person or persons, otherwise than
 "in working upon the said bank or dikes, for the repairing,
 "fortifying, and amending of the same, shall be adjudged fe-
 "lony, and that the justices of peace of the said counties of
 "Norfolk and Cambridge, within the said isle, shall have full
 "power

“ power at their sessions to cause enquiry to be made of every
 “ such offence, to award like process, judgment, and exe-
 “ cution, as they have used to do upon other felonies,
 “ being felony at common law.”

† *Stat. 2.* It is enacted by 1 Geo. 2. st. 2. c. 19. s. 2.
 made perpetual by 27 Geo. 2. c. 16. “ That whoever shall, ei-
 “ ther by day or night, wilfully and maliciously break down
 “ or demolish any lock, sluice, or floodgate erected by act of
 “ parliament upon any navigable river, for preserving or secu-
 “ ring the navigation thereof, on conviction, by indictment
 “ within six months at the assizes, may be transported for
 “ seven years.”

† *Stat. 3.* By 8 Geo. 2. c. 20. made perpetual by 27 Geo.
 2. c. 16. “ Whoever shall wilfully or maliciously pull down,
 “ pluck up, throw down, level, or otherwise destroy any lock,
 “ sluice, floodgate or other works, on any navigable river,
 “ erected by authority of parliament; or forcibly rescue any
 “ person or persons in lawful custody for the same, shall
 “ suffer death without benefit of clergy.” The offence may
 be tried in any adjacent county, but without corruption of
 blood, &c.

† *Stat. 4.* It is also enacted by the said statute, par. 2.
 “ That whoever shall wilfully and maliciously draw or pluck
 “ up any flood-gate, fixed or made in any wear or lock,
 “ erected by authority of parliament, in or upon any navigable
 “ river, for preserving the navigation thereof, on conviction
 “ by one witness, before two justices of that or of the adja-
 “ cent county, shall be sent to hard labour for one month in
 “ the house of correction;—and the hundred made liable to
 “ the amount of twenty pounds, &c.”

† *Stat. 5.* And it is further enacted by 10 Geo. 2. c. 32.
 “ That whoever shall unlawfully cut off, draw up, or remove
 “ and carry away, any piles, chalk, or other materials which
 “ shall be driven into the ground and used for the securing
 “ any marsh, or sea-walls or banks, in order to prevent the
 “ lands lying within the same, from being overflowed and
 “ damaged, shall forfeit twenty pounds; one moiety to the
 “ informer, the other to the poor; and in default, by dis-
 “ tress, shall be kept at hard labour for six months.” Any
 one justice of the place, on information upon oath, may sum-
 mon the offender to appear, or issue his warrant to apprehend him, and upon appearance, or non-appearance, may
 convict, on confession, or the oath of one witness.

† *Stat. 6.* And, it is further enacted by the above statute,
 “ That all the provisions of the Black Act of 9 Geo. 1. c.
 “ 22. for the bringing offenders, their aiders and abettors
 “ to justice; for making compensation to the party injured;
 “ for the reward for apprehending offenders, &c. and for
 “ the more impartial punishment of the offences therein

" mentioned ; together with all restrictions, limitations, and mitigations of the said act, shall extend to all cases of offences by breaking down, or cutting down any bank or banks of any river, or any sea-bank, whereby any lands shall be overflowed or damaged."

† *Stat.* 7. And by 6 Geo. 2. c. 37. made perpetual by 31 Geo. 2. c. 42. " Whoever shall unlawfully and maliciously break down, or cut down the bank or banks of any river, or any sea bank, whereby any lands shall be overflowed, or damaged, shall suffer death without clergy."

Vide 23 Geo. 3. c. 25.

† *Stat.* 8. By 27 Geo. 2. c. 19. " Whoever shall maliciously cut, break down, burn, demolish, or destroy any bank, mill, engine, floodgate or sluice, erected, made, supported or maintained for the purpose of benefiting the Bedford level, shall suffer death without clergy." And further, " Whoever shall maliciously stop, dam up, demolish, damage, or destroy any river, drain, water-course, door, dam, bridge, or other works erected for the purposes aforesaid, on conviction before two justices for the counties and isles, or either of them, shall forfeit one hundred pounds."

† *Stat.* 9. By 4 Geo. 3. c. 12. s. 5. which recites that the laws in being were not sufficient for the preservation of banks, floodgates, sluices, and other works belonging to navigable rivers, and thereupon it is enacted " That whoever shall, wilfully or maliciously break, throw down, damage or destroy any banks, floodgates, sluices, or other works, or open or draw up any floodgate, or do any other wilful hurt or mischief to any navigation erected by authority of parliament, so as to obstruct, hinder, or prevent the carrying on, compleating, supporting, or maintaining such navigation, may be transported for seven years."

For the penalty of breaking the dams of private fisheries, vide 37 Hen. 8. c. 6. and 5 Eliz. c. 21. For obstructing and filling up any haven, road, channel, or navigable river, vide 19 Geo. 2. c. 22. Burr. 656. For offences by barge boats on the river Thames, 2 Geo. 3. c. 28. And for the prevention of thefts on navigable rivers, vide 24 Geo. 2. c. 45.

CHAPTER THE FIFTY-SIXTH.

OF OFFENCES BY TRESPASSERS ON THE BORDERS; AND RIOTERS.

IT is recited by 43 Eliz. c. 13. " That then of late years many of the queen's subjects dwelling in the counties of Cumberland, Westmorland, and the bishoprick of Durham, had been taken, some from their own houses, and other in travelling on the highway, or otherwise, and been carried away as prisoners, and kept barbarously, and cruelly, until they

4 Jac. 1. c. 1.

7 Jac. 1. c. 1.

3 Inst. 66. 67.

3 Burn. 211.

232.

4 Comm. 243.

they had been redeemed by great ransoms; and also, that then of late time there had been many incursions, robberies, and burning and spoiling of towns, villages, and houses, within the said counties, so that divers of the queen's subjects, in the said counties, had been enforced to pay a certain rate of money, corn, cattle, or other consideration, commonly called black-mail, to divers inhabiting upon or near the borders, being men of name, and friended and allied with divers in those parts, who were commonly known to be great robbers, and spoil-takers, within the said counties, to the end thereby to be by them protected from the danger of such as used to rob and steal in those parts;" and thereupon it is enacted, " That whosoever shall at any time hereafter, without good and lawful warrant or authority, take any of her majesty's subjects against his or their will or wills, and carry them out of the same counties, or detain, force, or imprison him or them, as prisoners, or against his or their wills, to ransom them, or to make prey or spoil of his or their person, or goods, upon deadly feud or otherwise: or whosoever shall be privy, consenting, aiding, or assisting unto any such taking, detaining or carrying away, or procure the taking, detaining, or carrying away of any such person or persons prisoners as aforesaid: or whosoever shall take, receive, or carry, to the use of himself, or wittingly to the use of any other, any money, corn, cattle, or other consideration, commonly called black-mail, for the protecting, or defending of him or them, or his or their lands, tenements, goods, or chattels, from such thefts, spoils, and robberies, as is aforesaid: or whosoever shall give any such money, corn, cattle, or other consideration, called black-mail, for such protection as is aforesaid, and shall be of the said several offences, or of any of them, indicted and lawfully convicted, or shall stand mute, or shall challenge peremptorily above the number of twenty before the justices of assizes, justices of gaol delivery, justices of oyer and terminer, or justices of peace, within any of the said counties, at some of their general sessions, within some of the said counties to be holden, shall be reputed, adjudged, and taken to be as felons, and shall suffer pains of death, without any benefit of clergy, &c."

† *Stat. 2.* By 13 & 14 Car. 2. c. 22: made a public act by 6 Geo. 2. c. 37. and perpetual by 31 Geo. 2. c. 42. " The justices of the peace of the respective counties of Cumberland and Northumberland, or the major part of them, at any general sessions, may in open court, make an order for charging the inhabitants proportionally, for the securing the said several counties from the depredations of the *moss troopers*; so as Northumberland be not charged above 500*l.* nor Cumberland above 200*l.* a year: and they may appoint

“ 30 men in Northumberland, and 12 men in Cumberland, under respective commanders, to apprehend offenders, under pain of fine and imprisonment for neglect of duty. But “ *vide* 29 & 30 Car. 2. c. 2. which obliges the justices to “ take security, &c.”

For the process of apprehending offenders who shall escape into Scotland, vide 13 Geo. 3. c. 31. And for the riot 1 Geo. 1. f. 2. c. 5. *Infra*, c. 65. f. 56.

† *Sect.* 3. By 18 Car. 2. c. 3. “ The benefit of clergy is taken away from great, known, and notorious thieves, and spoil-takers in the said counties of Northumberland and Cumberland, for theft done within the same; but the justices of assize may transport them for life.”

CHAPTER THE FIFTY-SEVENTH.

OF OFFENCES BY BANKRUPTS AND INSOLVENT DEBTORS.

(The 4 Ann. c. 17. and 5 Ann. c. 2. recited in the former edition are expired.)

(a) There is a particular provision in the act to prevent their being maliciously sued, but the injured creditor may like to bring an action on the case against the offender, 3 Burr. 1479.

(b) The commissioners cannot break open any but the bankrupt's house to search for concealed effects.

IT is enacted by 5 Geo. 2. c. 30. continued by 21 Geo. 3. c. 29. f. 8. “ That if any person or persons have become bankrupt, or who shall at any time hereafter become bankrupt within the intent and meaning of the several statutes made and now in force concerning bankrupts, or any of them, and against whom a commission of bankrupt under the great seal of Great Britain hath been awarded and issued out, or shall at any time hereafter be awarded and issued out, whereupon the person or persons against whom such commission hath issued (a) or shall issue, have or hath been, or shall be declared bankrupt or bankrupts, shall not within forty-two days after notice thereof in writing, to be left at the usual place of abode of such person or persons, or personal notice, in case such person or persons be then in prison, and notice given in the London Gazette that such commission or commissions is are or have been issued, and of the time and place of a meeting of the commissioners therein named, or the major part of them, surrender him, her, or themselves to the said commissioners named in the said commission, or the major part of them, and sign or subscribe such surrender, and submit to be examined from time to time upon oath, or being the people called *quakers*, upon the solemn affirmation by law appointed for such people, by and before such commissioners, or the major part of them, by such commission authorised, and in all things conform to the several statutes already made and now in force concerning bankrupts; and also upon such his, her, or their examination, fully and truly disclose and discover all his, her, or their effects (b) and estate real and personal, and how and in what manner, to whom, and upon what consideration, and at what time or times he she or they have or hath disposed of, assigned, or transferred any of his, her, or their

“ their goods, wares, merchandizes, monies, or other estate
 “ and effects, (and all books, papers, and writings relating
 “ thereto) of which he, she, or they was or were possessed,
 “ or in or to which he, she, or they was or were any ways
 “ interested or intitled, or which any person or persons had,
 “ or hath, or have had in trust for him, her, or them, or for
 “ his, her, or their use, at any time before or after the issu-
 “ ing of the said commission, or whereby such person or per-
 “ sons, or his, her, or their family or families, hath or have
 “ or may have or expect any profit, possibility of profit, bene-
 “ fit or advantage whatsoever, except only such part of his,
 “ her or their estate and effects, as shall have been really and
 “ *bonâ fide* sold or disposed of in the way of his, her, or their
 “ trade and dealings; and except such sums of money as shall
 “ have been laid out in the ordinary expence of his, her or
 “ their family or families; and also upon such examination
 “ deliver up unto the said commissioners by the said commis-
 “ sion authorised, or the major part of them, all such part of
 “ his, her, or their the said bankrupt's goods, wares, mer-
 “ chandizes, money, estate and effects, and all books, papers,
 “ and writings relating thereto, as at the time of such exa-
 “ mination shall be in his, her, or their possession, custody or
 “ power, (his, her, or their necessary wearing apparel, and the
 “ necessary wearing apparel of the wife and children of such
 “ bankrupt only excepted) then he, she, or they the said bank-
 “ rupt or bankrupts in case of any default and wilful omission
 “ in not surrendering and submitting (1) to be examined as
 “ aforesaid; or in case he, she, or they shall remove, conceal, or
 “ embezzle any part of such his, her, or their estate real or
 “ personal to the value of twenty pounds, or any books of ac-
 “ count, papers, or writing relating thereto, with an intent
 “ to defraud his, her, or their creditors, (and being thereof
 “ lawfully convicted by judgment or information) shall be
 “ deemed and adjudged to be guilty of felony, and shall suf-
 “ fer as felons without benefit of clergy, (2) or the benefit of
 “ any statute made in relation to felons; and in such case
 “ such felons goods and estate shall go and be divided among
 “ the creditors seeking relief under such commission.”

-Vide Cooke's
Bankrupt laws,
chap. 6.

The Bankrupt's
wife cannot be
examined, 1 P.
Wms. 611.

(1) Vide the case
Ex parte Lin-
good, 1 Atkins
240.

(2) As this is a severely penal law, reaching the life of the bankrupt, a court of equity will not lend its aid to the prosecution, by ordering the clerk of the commission to attend at the Old Bailey with the proceedings under the commission; but the party must prove him both a bankrupt and a felon, within the meaning of the act. Cooke's Bankrupt laws 104, 106. So also in the commitment by the commissioners, the act must be strictly pursued. 1 Salk. 348. 2 Black 1144. 2 Strange 880.

† *Sec. 2.* But it is provided by the said statute, par. 3.
 “ That it shall and may be lawful to and for the said chan-
 “ cellor, or lord keeper, or commissioners for the custody of
 “ the great seal for the time being, to enlarge the time for
 “ such person or persons surrendering him, her, or themselves,
 “ and disclosing and discovering his, her, or their estate and
 “ effects

“ effects as aforesaid, as the said lord chancellor, lord keeper, or such commissioners shall think fit, not exceeding fifty days, to be computed from the end of the forty-two days, (*vide the second section of the act*) so as such order for enlarging the time be made six days at least before the time on which such person or persons was or were so to surrender him, her, or themselves, and make such discovery as aforesaid.”

Crooke's B. L.
288.
5 Mod. 309.
Comb. 391.
2 Black. 1035.
1 Atk. 204, 289.
L. Raym. 153.

† *Sec. 3.* And it is further enacted, par. 21. “ That whoever shall have accepted of any trust, and shall wilfully conceal or protect any part of the bankrupt's estate and effects from the creditors, and shall not discover the same within forty-two days after the commission issues, either to the commissioners or assignees, or submit to be examined (1) by the commissioners, shall forfeit 100*l.* and double the value of the property concealed.

(1) If a bankrupt absconds, or is likely to run away between the time of the commission issued and the last day of surrender, he may by warrant from any judge or justice of peace, be apprehended and committed to the county gaol. 2 Comm. 401. See also Perrott's case. Green 197, 204. Burr. 1123. Cooke's Bank. laws 202, 203, 107.

Explained by 29
Geo. 2. c. 18.

† *Sec. 4.* Secondly, “ And whereas several persons who are prisoners for debt, chuse rather to continue in prison and spend their substance there, than discover and deliver up to their creditors their estates and effects,” It is therefore enacted by 28 Geo. 2. c. 13. s. 39. “ That any one or more of the creditors of any prisoner at whose suit he or she is detained in prison, upon 20 days notice in writing to such prisoner and the person in whose custody he is, to require the keeper of the prison to bring such prisoner before the justices at their next general or quarter sessions of the peace, or any adjournment thereof for the county or place, together with a copy of the cause of his detainer, and such prisoner shall then, at the request of a creditor, be obliged to deliver in upon oath, and subscribe a schedule of his estate and effects (in the manner directed by the act) to be vested, assigned, and equally divided for the benefit of his creditors, and on conviction of wilful perjury therein, or if such prisoner so brought up as aforesaid shall neglect or refuse to deliver in and subscribe such schedule within forty days, such offender shall suffer death without clergy.”

CHAPTER THE FIFTY-EIGHTH.

OF OFFENCES BY COUNTERFEITERS OF BANK-NOTES, EXCHEQUER-BILLS, STAMPS, SOUTH-SEA BONDS, LOTTERY ORDERS, &c.

To erase the
usual mark made
with red ink a-
cross the face of

AND first as to counterfeiters of bank-notes, it is enacted by 8 & 9 Will. 3. c. 20. s. 36. “ That the forging or counterfeiting the common seal of the governor and
“ company

“ company of the bank of England, or of any sealed bank-
 “ bill, made or given out in the name of the said governor
 “ and company, for the payment of any sum of money, or of
 “ any bank-note of any sort whatsoever, signed for the said
 “ governor and company of the bank of England, or the al-
 “ tering or rasing any endorsement on any bank-bill, or note
 “ of any sort, shall be adjudged to be felony without benefit
 “ of clergy.”

a bank note, to denote that it has been paid, is erasing an indorsement within the meaning of this act, 1 Str. 18. 3 P. Wms. 419. — So also to alter the amount of the

sum for which a bank note is made, is a forging, and counterfeiting of the bank note. 1 Str. 19. And in forging the name; the cashier whose name is signed to the note is an admissible witness to prove it forged. O. B. 1784. p. 345, 837.

† *Sec. 2.* And it is also enacted by 11 Geo. 1. c. 9. f. 6.
 “ That whoever shall alter, forge, or counterfeit any bank-bill
 “ or note of the bank of England, or bank-note of any sort
 “ whatsoever; or shall erase or alter the same, or any in-
 “ dorsement thereon; or shall tender in payment, utter, vend,
 “ exchange, or barter any such altered, forged, or counter-
 “ feited bill or note, or any erased or altered bill or note, or
 “ the indorsement thereon; or shall knowingly demand to
 “ have the same exchanged for ready money, with intention
 “ to defraud, shall suffer as in *cases of felony*.”

Vide the case of Rex v. Elliot, Kent' Assizes, July 1777, and the case of Rex v. Dick, on the forgery of a Scotch Bank note.

† *Sec. 3.* And it is further enacted by 12 Geo. 1. c. 32. f. 9. “ That whoever shall forge, or procure to be forged,
 “ or assist in forging the name or hand of any of the cashiers
 “ to any instrument or writing whatsoever, for and in order
 “ to obtain the property of any of the suitors of the court of
 “ chancery; or any instrument or writing made by any of the
 “ said cashiers with intention to defraud any person whatso-
 “ ever shall suffer death without clergy.”

Moor 666. Shaw 135.

† *Sec. 4.* And it is further enacted by 15 Geo. 2. c. 13. f. 11. “ That whoever shall alter any bank-note, bank-
 “ bill, dividend, warrant, bond or obligation under the com-
 “ mon seal of the bank of England, or any indorsement there-
 “ on, or shall offer to, or dispose of, or put away the same,
 “ or shall demand the money, or any part thereof of the
 “ said company, their servants, or other person knowingly,
 “ to defraud the said company, their successors, or any other
 “ person, shall suffer death without clergy.”

† *Sec. 5.* And whereas frauds have been committed by forging the notes and bills of the governor and company of the bank of England, notwithstanding the statutes now in force for punishing and suppressing the same, it is therefore enacted by 13 Geo. 3. c. 79. “ That whoever (other than
 “ the officers or agents of the said company authorized, ap-
 “ pointed and employed for that purpose) shall make or use,
 “ or cause or procure to be made or used, or knowingly aid
 “ or assist in the making or using; or (without being autho-
 “ rized as aforesaid) shall knowingly have in their custody or
 “ possession (without lawful excuse, the proof whereof shall
 “ lie

“ lie upon the person accused) any frame, mould, or instrument, for the making of paper with the words *Bank of England* visible in the substance of such paper; or shall make or cause or procure to be made, or knowingly aid or assist in the making any paper in the substance of which the said words *Bank of England* shall be visible—or if any person (except as before excepted) shall by any art, mystery, or contrivance cause or procure the said words *Bank of England* to appear in the substance of any paper whatsoever, shall suffer death without benefit of clergy.”

† *Stat. 6.* And by par. 2. “ Whoever, without being authorised as aforesaid, shall engrave, cut, etch, or scrape in mezzotinto, or shall cause or procure the same to be done, or shall aid or assist in so doing, in or upon any plate of copper, brass, steel, pewter, or of any other metal, or mixture of metals, or upon wood or any other material, or any plate whatsoever, any promissory note, inland bill, or bill of exchange, or blank promissory note, inland bill, or bill of exchange, or part of the same containing the words *Bank of England*, or *Bank post bill*, or any word or words expressing the sum or amount, or any part of the sum or amount of such promissory note, inland bill, or bill of exchange, in white letters or figures on a black ground; or shall use any such plate so engraved, or any other instrument for the making or printing of such promissory note, &c.—or shall knowingly have in their custody any such plate or instrument, or shall knowingly and wilfully utter any such promissory note, &c. shall be committed to the common gaol of the county or place where the offence shall be committed, for any space not exceeding six months.—But this act shall not extend to persons carrying such notes for payment, &c.”

† *Stat. 7.* Secondly, As to counterfeiters of exchequer-bills, it is enacted by 25 Geo. 3. c. 2. “ That if any person or persons shall forge or counterfeit any exchequer-bill which shall have been made forth by virtue of this act, before the same shall be paid off and cancelled, or any exchequer-bills to be received or made forth in pursuance of this act, or any indorsement or writing thereupon or therein, or tender in payment any such forged or counterfeit bill, or any exchequer-bill with such counterfeit indorsement or writing thereon, or shall demand to have such counterfeit bill, or any such exchequer-bill with such counterfeit indorsement or writing thereon or therein, exchanged for ready money by any person or persons, body or bodies politick or corporate, who shall be obliged or required to exchange the same, or by any other person or persons whatsoever, knowing the bill so tendered in payment or demanded to be exchanged, or the indorsement or writing thereupon or therein to be forged or counterfeited;”

“ and

“ and with intent to defraud his majesty, his heirs and successors, or the persons to be appointed to pay off the same, or any of them, or to pay any interest thereupon, or the person or persons, body or bodies politick or corporate, who shall contract to circulate or exchange the same, or any of them, or any other person or persons, body or bodies politick or corporate, then every such person or persons so offending, being thereof lawfully convicted, shall be adjudged a felon, and shall suffer as in cases of felony without benefit of clergy.”

† *Stat. 8.* By 9 Geo. 1. c. 12. for the more easy transferring certain exchequer annuities, “ Whoever shall forge or counterfeit, or shall procure, &c. or aid in the forging or counterfeiting any order made forth in pursuance of this act, or of the 6 Geo. 1. c. 11. 6 Geo. 1. c. 17. 7 Geo. 1. c. 30. 8 Geo. 1. c. 20. or any assignment of such order, or of the annuities payable thereon, or of any receipt or discharge to the exchequer for the annuities due, or to grow due on such order, or any authority to transfer such order or annuities. Or shall forge, &c. the name of any of the proprietors, &c. or shall endeavour to receive such annuities, or any part thereof, by virtue of such forged authority, or shall personate any true and real proprietor of the said orders, and receiving, or endeavouring to receive the money of such proprietor, as if such offender were the true and lawful owner thereof, shall be guilty of felony without clergy.”

Vide also 4 Geo. 2. c. 9.
9 Geo. 2. c. 34.
11 Geo. 2. c. 27.

† *Stat. 9.* Thirdly, As to counterfeiters of stamps, it is enacted by 5 Will. & Mar. c. 21. f. 11. which is the first act upon the subject, “ That whoever shall counterfeit or forge any stamp or mark, to resemble any stamp or mark which shall be provided or made in pursuance of this act, or shall counterfeit or resemble the impression of the same upon any vellum, parchment, or paper, thereby to defraud their majesties, their heirs and successors, of any of the duties hereby granted, or shall utter, vend, or sell any vellum, parchment or paper, with such counterfeit mark or impression thereupon, knowing such mark or impression to be counterfeited, shall suffer death without the benefit of clergy.”

The following acts have also imposed stamp duties, and contain the same clause against the forging or counterfeiting of them.

5 W. and M. c. 21.
6 Will. 3. c. 6.
6 Will. 3. c. 12.
7 Will. 3. c. 79.
8 Will. 3. c. 25.
9 Will. 3. c. 25.
9 Will. 3. c. 44.
1 Ann. c. 13.

1 Ann. f. 2. c. 22. 4 Ann. c. 12. 4 Ann. c. 16. 5 Ann. c. 8. 5 Ann. c. 19. 6 Ann. c. 8.
8 Ann. c. 19. 9 Ann. c. 21. 9 Ann. c. 23. 10 Ann. c. 19. 10 Ann. c. 26. 12 Ann. f. 1. c. 21.
12 Ann. f. 1. c. 9. 1 Geo. 1. f. 2. c. 12. 3 Geo. 1. c. 9. 5 Geo. 1. c. 19. 6 Geo. 1. c. 41.
6 Geo. 1. c. 21. 11 Geo. 1. c. 8. 11 Geo. 1. c. 30. 11 Geo. 1. c. 33. 2 Geo. 2. c. 23.
9 Geo. 2. c. 32. 11 Geo. 2. c. 19. 16 Geo. 2. c. 26. 18 Geo. 2. c. 22. 20 Geo. 2. c. 45.
23 Geo. 2. c. 25. 23 Geo. 2. c. 26. 29 Geo. 2. c. 22. 29 Geo. 2. c. 13. 30 Geo. 2. c. 19.
30 Geo. 2. c. 35. 2 Geo. 3. c. 36. 5 Geo. 3. c. 35. 5 Geo. 3. c. 46. 5 Geo. 3. c. 47.
6 Geo. 3. c. 46. 7 Geo. 3. c. 44. 8 Geo. 3. c. 25. 12 Geo. 3. c. 48. 13 Geo. 3. c. 67.
16 Geo. 3. c. 34. 17 Geo. 3. c. 50. 19 Geo. 3. c. 56. 20 Geo. 3. c. 28. 21 Geo. 3. c. 56.
22 Geo. 3. c. 33. 23 Geo. 3. c. 49. 23 Geo. 3. c. 53. 23 Geo. 3. c. 67. 24 Geo. 3. c. 74.
25 Geo. 3. c. 50.

(a) One of the marks is a lion passant guardant, so that an indictment describe the lion to be rampant, it is void, and the prisoner must be acquitted. O. B. 1786, p. 790.

By the 24 Geo. 3. c. 20. the manufactures of Sheffield are excluded from the operation of this act, under the regulation therein mentioned.

† Sect. 10. But by 13 Geo. 3. c. 56. "Whoever shall cast, forge, or counterfeit any mark or stamp (a) used for making of gold and silver plate, in pursuance of 12 Geo. 2. c. 26. or any other act, or shall counterfeit any stamps or impression to resemble that used by the goldsmiths company, or shall transpose the same from one piece of wrought plate to another, or to any piece of base metal, or shall sell, exchange, or expose to sale, or export out of this kingdom any wrought plate of gold or silver, or any vessel of base metal, with such counterfeited mark thereon, or any mark, stamp, or impression which shall have been transposed or removed from any other piece of plate, or be possessed of any mark or stamp which shall be forged in imitation as aforesaid, their procurers, &c. shall be transported for fourteen years.—And by 24 Geo. 3. c. 53. sect. 16. to commit this offence in the manner described by that act, is felony without benefit of clergy."

† Sect. 11. Fourthly, As to counterfeiters of South-sea bonds, it is enacted by 9 Annæ 21. c. 27. s. 51. "That if any person or persons shall forge or counterfeit the common seal of the South-sea company, or shall forge, counterfeit, or alter any bond or obligation under the common seal of the said company, or shall offer to dispose of, or pay away any such forged, counterfeited, or altered bond, (knowing the same to be such) or shall demand the money therein contained, or pretended to be due thereon, or any part thereof, of the said company, or any of their officers, knowing the same to be forged, counterfeited or altered, with intent to defraud the said company, or any other person or persons, every such offender shall suffer as a felon without the benefit of clergy."

† By 8 Geo. 1. c. 22. "Whoever shall forge or counterfeit, or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting any letter of attorney, or other authority or instrument to transfer, assign, sell, or convey any share or part thereof in any capital stock and funds of the South-sea company; or to receive any South-sea annuity or dividend, or any part thereof;—or shall forge or counterfeit, or procure to be forged or counterfeited, or shall knowingly and wilfully aid or assist in the forging or counterfeiting the name of any of the proprietors of any such share in stock, or of any persons intitled to any such annuity or dividend, or to any such pretended letter of attorney, instrument, or authority;—or shall knowingly and fraudulently demand, or endeavour to have any such share or stock, or any part thereof transferred, assigned, sold, or conveyed, or such annuity or dividend, or any part thereof to be received

"by

“ by virtue of any such counterfeit or forged letter of attorney, authority, or instrument;—or shall personate any true and real proprietor of the said shares, annuities or dividends, and thereby receive, or endeavour to receive the money for the same, as if such offender were the lawful owner thereof, shall be guilty of felony without clergy.”

† *Sec. 12.* Fifthly, As to counterfeiters of lottery orders, it is enacted by 25 Geo. 3. c. 57. “ That if any person or persons shall forge or counterfeit, or cause or procure to be forged or counterfeited, or willingly act or assist in the forging or counterfeiting any ticket or tickets, certificate or certificates, order or orders, made forth by virtue of this present act, or any former act made for establishing any lottery or lotteries, or altering any number, figure, or word therein, or utter, vend, ba ter, or dispose of any such false, altered, forged, or counterfeited ticket or tickets, certificate or certificates, order or orders, or shall bring any such forged or counterfeited ticket, certificate, or order, or any such ticket, certificate or order, the number whereof, or any figure or words therein shall have been altered (knowing the same to be such) to the said managers, or any of them, or to the cashier or cashiers, or accountant-general of the bank of England for the time being, or to any other person or persons whatsoever, with a fraudulent intention; or shall willingly aid, abet, assist, hire, or command any person or persons to commit such offence or offences as aforesaid, such offenders shall suffer death without clergy.”

† *Sec. 13.* And it is also enacted “ That the managers and directors, or any two or more of them, are authorised, required and impowered to cause any person or persons bringing or uttering such forged or counterfeit ticket or tickets, certificate or certificates, as aforesaid; or aiding, abetting, assisting, hiring or commanding any person or persons therein; to be apprehended, and to commit him, her, or them to Newgate, or to the county gaol.—And offenders (not in prison) discovering persons guilty, are intitled to a reward of fifty pounds, and a pardon.”

† *Sec. 14.* Sixthly, As to other forgeries, It is enacted, By 6 Geo. 1. c. 18. f. 13. and 14 Geo. 2. c. 37. “ Who-
“ ever shall forge or counterfeit the common seal of
“ either the London, or the Royal Exchange Assurance
“ corporations, or shall forge, counterfeit, or alter any po-
“ licy, bill, bond or obligation under their common seal; or
“ shall knowingly offer to dispose of, or pay away any such
“ policy, bill, bond, or obligation; or shall demand the mo-
“ ney for the same, or any part thereof, of or from such of
“ the same corporations as shall be mentioned or referred to
“ therein,

For the offence
of forging the
testimonial of a
justice by a wan-
dering falcon or
solace, vide
ante. c. 48. l. 2.

' therein, or any of their officers, shall suffer death without clergy."

† *Stat.* 15. By 12 Geo. 1. c. 32. s. 9. "Whoever shall forge or counterfeit, &c. the name or hand of the accountant-general, register, clerk of the report-office in chancery, in order to obtain the money of any of the suitors of the said court of chancery;—or any instrument or writing made by such accountant-general, register or clerk, with intent to obtain the money as aforesaid;—or shall forge or counterfeit any bond or obligation under the common seal of the East-India company, or any indorsement or assignment thereon, or shall knowingly publish the same; with intention to defraud any person whatsoever, shall suffer death without clergy."

Vide O.B. 1784,
p. 241.
O. B. 17
p. 654.

† *Stat.* 16. By 2 Geo. 2. c. 25. made perpetual by 9 Geo. 2. c. 18, "Whoever shall falsly make, forge, or counterfeit, or shall cause or procure, &c. or shall wilfully act or assist in falsly making, forging, or counterfeiting any deed, (1) will, testament, bond, writing obligatory, bill of exchange, promissory note for the payment of money, indorsement or assignment of any bill of exchange, or promissory note for the payment of money, (2) or any acquittance or receipt either (3) for money or goods, with intention to defraud any person whatsoever, and by 31 Geo. 2. c. 22. s. 78. with intention to defraud any corporation whatsoever; or shall, with the like intent, knowingly utter or publish the same as true, shall suffer death without clergy."

(1) A deed, forged in the name of a person who never had existence, is within the statute; for the statute doth not use the words *the deed of any person*, or the deed of another, or any words of the like import, but *any deed*. Lord Coke's description of forgery, 3 Inst. 169, viz. "When the act is done in the name of another person," is apparently too narrow, and taketh in only that species of forgery which is most commonly practised; but there are many other species of forgery which will not come within the letter of that description. Foster 116. So also where a person in possession of a promissory note, which had been lost, indorses it in a fictitious name in order to get it discounted, he is guilty of forgery. Rex v. Tuft, Leicester Lent Assizes, 1777. M.S.

(2) At Kent Summer Ass. 1777. James Elliot was indicted, among other counts, "For forging a promissory note for the payment of money, with intention to defraud the Bank, &c." It was intended to counterfeit a bank note, but the insertion of the word "pounds" was omitted to be put after the sum; the £. however, was placed as usual at the corner; there was no water mark, "Bank of England," and the paper was of a thicker quality. The jury thought the sum mentioned meant pounds, and the prisoner was found guilty. It was objected that it was not a note for the payment of money, because the word descriptive of money was omitted. Secondly, That the water mark not being in it, it could not be intended to defraud a corporation. On reference the judges held the conviction good, for that perfect similitude is not necessary, but if made with an aptness to impose, it is sufficient. The water mark is not essential, for the Bank are not obliged to use it, and it is enough if the tenor of the note imports a promise from the corporation to pay. Trin. Term, 17 Geo. 3. M.S.

(3) In setting out a forged receipt in an indictment upon this act, the words "as follows" is a sufficient averment that the tenor of it is set out. And it is only necessary to aver a general intent to defraud, without stating the manner in which the fraud was to be accomplished. Rex v. Powel, Black. 787. So also in forgery of a will, it is not necessary to charge the prisoner with forging the last will, &c. To charge it "a paper writing, purporting to be the last will, &c." is sufficient. 2 Black. 790.

† *Stat.*

† *Stat.* 17. By 4 Geo. 2. c. 18. "Whoever shall forge, &c. any pass, commonly called a Mediterranean pass, for any ship whatsoever, or shall counterfeit the seal of office, or the hand of the lord high admiral, or of any of the commissioners of the said office, to any such pass;—or shall alter any true pass made out by the admiralty, or shall knowingly utter and publish the same as true; the offence may be tried in any county, and the offender shall suffer death without clergy."

† *Stat.* 18. By 7 Geo. 2. c. 22. "whoever shall falsely make, alter, forge, or counterfeit, or cause or procure, &c. or shall act or assist in falsely making, altering, forging, or counterfeiting any acceptance of any bill of exchange, or the number or principal sum of any accountable receipt for any note, bill, or other security for the payment of money, or any warrant or order for payment of money, or delivery of goods, (4) with intention to defraud any person whatsoever; (and by 18 Geo. 3. c. 18. with intention to defraud any corporation whatsoever)—or shall, with the same intent, knowingly utter or publish the same as true, shall suffer death without clergy."

O. B. 1784,
p. 277, 1011.

(4) A forged order to a shop-keeper to let the bearer have goods, concluding "and I will see it all paid for," is not a warrant or order within the meaning of this act; for the person supposed to give such warrant or order should have, or claim at least an interest in the money or goods which are the subject matter of the order. Foster 120.—So in the case of George Williams, at Southampton summer circuit, 1775, for forging an order upon Mr. Guildmare, of Gosport, in the name of William Robinson, for the delivery of twelve barrels of tar; the judges were all of opinion, that, upon the authority of the case in Foster, that it was not within the statute, though most of them said, had it been *res integra*, they would have thought otherwise.—So, "Please to send ten pounds by the bearer, as I am so ill I cannot wait upon you," is not an order within the meaning of the statute. For it is not compulsory; nor such an order, as the party giving it, if genuine, had a right to make. O. B. 1783, p. 835.—But where a person having delivered a parcel of silver goods to the Goldsmiths' company to be assayed, two persons took an opportunity to obtain them by a forged order in the name of the owner, such order is within the statute. O. B. 1784, p. 1271. So also where a man purchases goods, and takes a small part of them away with him, and coming afterwards to pay for them, receives money in discharge out of a draft, signed in the name of a person unknown, who did not keep cash with the banker to whom it was directed, all the judges were of opinion it is within the statute. Rex v. Lockett, 1773. M.S.

† *Stat.* 19. By 8 Geo. 2. c. 6. s. 31. "Whoever shall forge or counterfeit any entry of the acknowledgment of any bargainor, in bargain and sale, in the registry of York, whereby the freehold or inheritance of any person shall be molested, shall incur the penalties of 5 Eliz."

† *Stat.* 20. By the marriage act 26 Geo. 2. c. 33. s. 16. "Whoever with intent to elude the force of this act, shall insert, or cause to be inserted in the register-book, any false entry of any matter or thing relating to any marriage, or shall false make, alter, forge, or counterfeit any such entry in such register,—or any licence of marriage,—or shall cause or procure the same to be done, &c. or shall utter or publish the same as true,—or shall destroy any register-book of marriages,

"marriages, with intent to avoid any marriage, or to subject any person to the penalties of this act."

By 9 Geo. 3. c. 30. s. 5. the treasurer, comptroller, surveyor, clerk of the acts, or any commissioner of the navy may act as justice, in causing the offenders to be apprehended and brought to justice; and all officers shall obey their warrants accordingly.

O. B. 1784, p. 98.

† *Sec. 21.* By 31 Geo. 2. c. 10. s. 24. "Whoever shall personate or falsely assume the name or character of any officer, seaman, or other person, intitled or supposed to be intitled to any wages, pay, or other allowance of money, or prize-money, for services done on board any of his majesty's ships, or the executor, administrator, wife, relation or creditor of any such officer, seaman, or other person, in order to receive any of the monies so due to such person, and payable for such services as aforesaid; or shall forge or counterfeit any letter of attorney, bill, ticket, certificate, assignment, last will, (5) or any other power or authority whatsoever, in order to receive any the monies so due to such person, and payable for such services as aforesaid; or shall take a false oath to obtain the probate of any will or letters of administration in order to receive the payment of any the monies as aforesaid; or shall cause or procure any of the said offences to be committed, shall suffer death without clergy."

(5) But the production of the probate is conclusive evidence in support of the will. *Rex v. Vinant*, Mich. 8 Geo. Strange 481, 671, 703. Wils. 75. 11 St. Tr. 213, 219, 233. 1 Vezey 119, 284.

† And by the 9 Geo. 3. c. 30. s. 6. "Whoever shall knowingly utter or publish as true, any false, forged, or counterfeited letter of attorney, bill, ticket, certificate, assignment, last will, or any other power or authority, in order to receive the monies due to any officer, seaman, or other person, who has really, or was supposed to have served, &c. with intent to defraud any person whatsoever, shall suffer death without clergy."

O. B. 1786, p. 689.

† *Sec. 22.* By 31 Geo. 2. c. 22. s. 77. and 4 Geo. 3. c. 25. s. 15. "Whoever shall forge or counterfeit any letter of attorney, or other authority or instrument to transfer, sell, assign, or convey any share, or part thereof, of, or in any the capital stock or funds of any body politick or corporate now established, or which shall be established by any act of parliament; or to receive any dividend attending any such share; or to receive any annuity in respect whereof any proprietor shall have a transferrable share; or shall forge or counterfeit the name of any proprietor of such share, annuity, or dividend, or of any the persons intitled to any such annuity or dividend, in or to any such pretended letter of attorney, instrument, or authority; or shall demand to have any such share, or part thereof, transferred, assigned, sold, or conveyed, or any such annuity, dividend, or part thereof, to be received by virtue of such forged authority; or shall personate any true and real proprietor, (5) and thereby endeavour

O. B. 1784, p. 227.

(5) The proprietor whose stock is transferred by such

“deavour to receive the money of such proprietor, as if such offender were the true and lawful owner thereof; or shall procure or aid the commission of any of the said offences, shall suffer death without clergy.”

forged power of attorney, is not an admissible witness to prove the forgery. 2 Strange 728.

† Sect. 23. By 32 Geo. 2. c. 14. s. 9. “Whoever shall forge or counterfeit the mark or hand of the receiver of the post fines due to the crown or its grantees, whereby such receiver shall be defrauded, or any other person suffer loss, or shall procure the same to be done, shall suffer death without clergy.”

† Sect. 24. By 3 Geo. 3. c. 16. “Whoever shall personate, or falsely assume the name and character of an out-pensioner of Greenwich hospital, in order to receive the out pension due to him, or to procure any other to do the same, shall be guilty of felony without clergy.”

† Sect. 25. By 4 Geo. 3. c. 24. s. 8. “Whoever shall counterfeit the hand writing of any person whatsoever, in the superscription of any letter or packet to be sent by the post, in order to avoid the payment of the duty of postage, shall be guilty of felony, and transported for seven years.”

And by Sect. 2. if any officer neglect the seal of this office he shall forfeit five pounds.

IN FORGERY it is incumbent on the prosecutor to give the best evidence the case admits of, to prove that the forgery charged upon the prisoner is not the hand writing of the person whose deed or instrument it purports to be, before the prisoner shall be put upon his defence; and consequently this proof will become more or less difficult in proportion as the person, whose name or writing is charged to be forged, is more or less defined and identified, either by the instrument itself, or by the representation of the party uttering it. Therefore, where Spontonby was indicted for forging the name of Pearce, the payee, on the back of a bill drawn by Davis, the court would not permit Pearce to say, although he had received advice of such a bill being drawn in his favour, that he was the payee, in whose favour Davis had drawn the bill, because Pearce may be the name of many others, who by possibility might have indorsed the bill, and as Davis was not present to define or identify the payee, the prisoner was discharged. O. B. 1734, p. 831. and 1015. So also where the name of John Churchill was forged on the back of a bill, the prosecutor proved the hand writing of the drawer, and produced one Henry Churchill, brother to a Mr. John Churchill, who swore the indorsement was not his brother's hand writing; yet as he could not prove that his brother was the identical person to whom the bill was made payable, the evidence was rejected. O. B. 1734, p. 1015. But where the indictment stated that the instrument forged, “purported to be a bank note,” but, in fact, it was very different, and distinguishable from that security, the court held that the defect could not be supplied, so as to support the indictment, by any representations of the party at the time he uttered it. Douglas 300.

APPENDIX THE FIRST.

OF OFFENCES AGAINST PROPERTY
ADHERENT TO THE FREEHOLD.

Vide the recital
of 43 Eliz. c. 7.

FORASMUCH as the unlawful cutting or taking away of corn growing, robbing of orchards and gardens, digging up or taking away fruit trees, breaking of hedges, pales, or other fences, cutting or spoiling of woods or underwoods, and other offences of a similar nature, have become more frequent and common than heretofore.

(a) Vide 37
Hen. 8. c. 6,
l. 4.

In a conviction upon this statute the number and the nature of the trees must be set forth, 1 Salk. 181. Comy. 131. And a gentleman is within the act if he commits the offences. *Ld. Ray.* 901. So also the manner of stealing must be noted, that the court may judge whether felonious or not, or whether the money ordered to be paid was an adequate recompence to the party injured. *Sayer* 204, 205.

† *Sec. 1.* It is enacted by 43 Eliz. c. 7. (a) "That whoever shall cut or unlawfully take away any corn or grain growing, or rob any orchards or gardens, or break or cut any hedge, pales, rails, or fence, or dig up or take up any fruit tree, or trees in any orchard, garden, or elsewhere, to the intent to take and carry the same away, or shall cut or spoil any woods or underwoods, pales or trees standing, not being felony by the laws of this realm, and their procurers, receivers, knowing the same, on conviction by confession, or the oath of one witness, before one magistrate, shall make compensation at the discretion of the magistrate, or be publicly whipped." And by 15 Car. 2. c. 2. The constable may search the houses of suspected wood stealers, and carry offenders before a justice, and if they do not "then and there give a satisfactory account how they came by the wood so found in their possession," they shall be adjudged as convicted of the offences, and liable to the punishments of the 43d of Eliz.

Vide *Rex v. Aston*, in a conviction upon this statute, "Ig-tur consideratum est per me, quod confitetur, &c." and the court held there ought to be a judgment quod fieri facias, or quod committatur, &c." for the act gives no pecuniary forfeiture. 2 Burr. 1166.

† *Sec. 2:* And it is farther enacted by 1 Geo. 1. c. 48. That whoever shall maliciously break down, cut up, pluck up, throw down, bark, or otherwise destroy, deface, or spoil any timber tree, fruit tree, or any other tree, on conviction by any two justices of the place, or by the justices in sessions, on complaint to them made by an inhabitant, or the owner, &c. shall be kept to hard labour for three months, and whipped once a month; or if there be no house of correction, to any other prison for four months, and whipped once in every month by the common hangman, and afterwards find sureties for their good behaviour for two years, and the party grieved may recover damages and costs from the inhabitants of the parish, &c. in the
" same

“ same manner and form as is directed by the 13 Edw. 1. ft. 1. c. 46. (a) for hedges and dykes, overthrown by persons in the night, unless the offender be convicted in six months by the parish.” (a) Vide ch. 50, sect. 1.

† *Sect. 3.* And it is further enacted by 6 Geo. 1. c. 16. “ That whoever shall cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away any wood springs, trees, poles, wood, tops of trees, underwoods, coppice woods, thorns or quicksets, without the consent of the owner, or person chiefly entrusted with the care and custody thereof, shall, on conviction by two justices, or at sessions, be liable to the same penalties and punishments as are inflicted by 1 Geo. 1. f. 2. c. 48. which conviction shall be final;—and unless the same be had within six months, such lords of manors, owners and proprietors who shall be injured by the offence, shall have such remedy and receive such compensation from the parishes or places joining on such wood springs, &c. as is directed by 13 Edw. 1. f. 1. c. 46.” Vide 4 Burn’s Justice, 399.

Vide 29 Geo. 2. c. 36. f. 8. for stealing or destroying trees growing in any waste thereby directed to be inclosed.

† *Sect. 4.* And by the Black act 9 Geo. 1. c. 22. “ Whoever shall cut down, or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard, or plantation, for ornament, shelter, or profit; or shall forcibly rescue any person in lawful custody for the same; or shall by gift, or promise of money, or other reward, procure any of his majesty’s subjects to join him or them in any such unlawful act, shall suffer death without benefit of clergy.”

† *Sect. 5.* And it is also enacted by 6 Geo. 3. c. 36. “ That whoever shall, in the night time, lop, top, cut down, break, throw down, bark, burn, or otherwise spoil or destroy, or carry away any oak, beech, ash, elm, fir, chestnut, or asp timber tree, or by the 13 Geo. 3. c. 33. any poplar, alder, maple, larch, or hornbeam, or other trees standing for timber, or likely to become timber, without the consent of the owner—Or shall in the night time pluck up, dig up, break, spoil or destroy, or carry away, any root, shrub, or plant, of the value of five shillings, and which shall be growing, standing, or being in the garden ground, nursery ground, or other inclosed ground of any person whomsoever, and their aiders, abettors, or procurers, and the buyers and receivers of the same, shall be transported for seven years.” O. B. 1784. p. 817.
O. B. 1786. No. 116.

† *Sect. 6.* And it is further enacted by 6 Geo. 3. c. 48. “ that whoever shall wilfully cut or break down, bark, burn, pluck up, lop, top, crop, or otherwise deface, damage, spoil or destroy, or carry away any timber tree, viz. oak, “ beech

(a) And by 13
Geo. 3. c. 33.
poplar, alder,
beech, maple,
and hornbeam.

The costs and
charges must be
definitely ascer-
tained and ex-
pressed in the
conviction, or it
will be fatal.
Cowp. 60.

Q. etc. » Ought
not these words
“*in like manner*,”
to be omitted, for can it be imagined that the legislature intended a justice of peace should, in
this statute, be empowered to transport an offender; and it seems implied by subsequent
words in the act, — “*in the third offence he should be tried by a jury.*”

“ beech, chefnut, walnut, ash, elm, cedar, fir, asp, lime,
“ sycamore, and birch, (a) or any tree likely to become timber,
“ or any part thereof, or the lops or tops thereof, without the
“ consent of the owner, or in any of his majesty’s forests or
“ chases, without the consent of the surveyor, his deputy, or
“ person intrusted with the care of the same, on conviction
“ by one witness before one justice, shall forfeit for the first
“ offence, not exceeding twenty pounds, together with the
“ costs and charges previous to and attending such conviction
“ to be ascertained by the justice convicting, and on non-
“ payment shall be committed to the common gaol, for any
“ time not exceeding twelve months, nor less than six, or un-
“ til the penalty and charges shall be paid.—For the second
“ offence, any sum not exceeding thirty pounds, and from
“ twelve to eighteen months imprisonment as aforesaid. And
“ if any person so convicted shall be guilty of the like offence
“ a third time, and shall be thereof convicted *in like manner*
“ he shall be transported for seven years.”

» Hale 724.

† *Stat. 7.* And it is further enacted by the said statute,
par. 3. “ That whoever shall pluck up, or cut, spoil, or de-
“ stroy, or take, or carry away, any root, shrub, or plant, out
“ of the fields, nurseries, gardens, or garden grounds, or
“ other cultivated lands, of any person whomsoever, without
“ the consent of the owners, on conviction by one witness,
“ before one justice, shall for the first offence forfeit not ex-
“ ceeding forty shillings, together with the charges previous
“ to and attending such conviction, to be ascertained by such
“ justice, or be committed to hard labour one month, and
“ whipped. For the second offence, not exceeding five pounds,
“ and hard labour for three months.—And if any person
“ so before convicted shall a third time commit the like offence,
“ and be thereof convicted, the court before whom he shall
“ be tried, shall have authority to transport him for seven
“ years.”

† *Stat. 8.* And by par. 4. “ Whoever shall go into any
“ woods, underwoods, or wood grounds belonging to the
“ king’s subjects, and shall there cut, lop, top, or spoil, split
“ down, or damage, or otherwise destroy any kind of wood,
“ or underwood, poles, sticks of wood, green stubs, or
“ young trees, or carry or convey away the same; or shall
“ have in their custody any kind of wood, underwood, poles,
“ sticks of wood, green stubs, or young trees, and shall not
“ give a satisfactory account how they came by the same, on
“ conviction by one witness, before one justice, shall forfeit
“ for the first offence, and pay immediately on conviction,
“ any

“ any sum not exceeding forty shillings, with costs and charges as aforesaid. For the second offence, not exceeding five pounds, &c. and for the third offence, being duly convicted thereof according to law, shall be deemed and punished as an incorrigible rogue: (a) and whoever shall obstruct the apprehending of offenders shall forfeit ten pounds, or suffer six months hard labour in the house of correction.”

(a) That is, by 17 Geo. 2. c. 5. f. 9. he may be committed by the sessions to

the house of correction, not exceeding two years, nor less than three months, to be kept to hard labour, and whipped as the justices shall order.

† Sect. 9. And it is further enacted by 9 Geo. 3. c. 41. f. 8. “ That the clause last above recited, shall extend to all his majesty’s forests and chaces within the realm, and to all and every person or persons who shall, without legal right or authority, by night or by day, cut down, destroy, take, carry, or convey away any hollies, thorns, or quicksets growing or being upon any of the king’s forests or chases, or within the woods or wood-grounds of any of his subjects, or who shall possess any hollies, thorns, or quicksets, and shall not give a satisfactory account of the same, &c. The conviction to be certified to the general quarter sessions, and not be liable to be quashed for want of form, or removed by certiorari.”

Vide 10 Geo. 3. c. 30. which remedies a misrecital of the 6 Geo. 3. c. 36, and 48 in this act.

By 4 Geo. 3. c. 21. keepers may seize implements of destruction for his or their own use.

† Sect. 10. And it is enacted, by 29 Geo. 2. c. 36. f. 8. amended by 31 Geo. 2. c. 41. “ That if any person shall unlawfully cut, take, destroy, break, throw down, bark, pluck up, burn, deface, spoil, or carry away any tree, growing in any waste, wood, or pasture, in which any person or persons, or bodies politick or corporate, hath, or have a right of common, he shall incur the like penalty as by 6 Geo. 1. c. 16.”

Sect. 11. Also it is enacted by the 13 Geo. 3. c. 32. “ That whoever shall steal and take away, or maliciously pull up or destroy any turnips, potatoes, cabbages, parsnips, pease, or carrots growing or being in any garden, lands, or grounds, open or inclosed, on conviction within thirty days, by confession, or on the oath of one witness, before one justice, shall forfeit, not exceeding ten shillings over and above the value of the goods stolen, to be distributed between, or wholly given to, the owner and the poor; and on default of payment to be committed to the house of correction not exceeding one month, unless sooner paid. The owner, or any inhabitant may be a witness, but if the conviction lie upon the oath of the owner, the whole penalty shall go to the poor. And by 31 Geo. 2. c. 35. f. 5. the same punishment is inflicted upon the stealing of madder roots.”

“ Sect.

Stealing ore out of mines, is not larceny common law, upon the same principle of adherence to the freehold. 4 Comm. 234.

Sett. 12. Also it is enacted by 25 Geo. 2. c. 10. "That whoever shall unlawfully break, or by force enter into any mine, wad-hole of wad, or black cawke, commonly called black lead, or into any pit, shaft, adit or vein of wad, black cawke, or black lead, with an intent to take and carry away from thence any wad, black cawke, or black lead; or shall unlawfully from thence take and carry away any wad, black cawke, or black lead, although such mine, wad-hole, pit, shaft, adit, or vein be not actually broke, or by force entered into by such offender; or shall aid, abet, assist, hire, or command any person or persons to commit such offences as aforesaid, such offenders shall be guilty of felony, and may be committed to the county gaol or house of correction for any time not exceeding a year, and publicly whipped; or transported for a term not exceeding seven years, as the court or judge shall think proper."

Vide 29 Geo. 2. c. 30.
O. B. 1785.
p. 824.
Vide the case of the King v. Jane Carragan, tried before Glynn, recorder.

† *Sett.* 13. Also it is enacted by 4 Geo. 2. c. 32. "That whoever shall steal, rip, cut or break, with intent to steal any lead, iron bar, iron grate, iron palasadoes, or iron rail whatsoever, being fixed to any dwelling house, out house, coach house, stable, or other building used or occupied with such dwelling house, or thereunto belonging, or to any building whatsoever, (1) or fixed in any garden, orchard, court yard, fence, or outlet belonging to any dwelling house or other building; their aiders, abettors, and assisters, or whoever shall knowingly buy or receive the same, shall be guilty of felony, and the court is empowered to transport such felons for the space of seven years."

(1) Hickman was indicted for stealing lead from Hendon Church, which was laid to be the property, First, of the Vicar; Secondly, of the Church Wardens; Thirdly, of the inhabitants and parishioners. The property being fixed to the freehold, (vide ante. ch. 33. s. 21.) it was doubted whether it could be the subject of larceny; and if it could, whether the property resided as laid in any of the counts in the indictment. The judges were of opinion, First, that "a Church" is included within these general words of the act, "or any other building whatsoever." Secondly, that the act having made the offence to consist in "stealing from any dwelling house or other building, &c." the charge in the indictment, that it was *stole from Hendon Church*, was alone a certain and sufficient description of the offence to support the indictment; that the residence of the property was immaterial; and that the conviction was proper upon the first count. O. B. 1785, p. 782.

† *Sett.* 14. And it is further enacted by 21 Geo. 3. c. 68. "Whoever shall rip, cut, break or remove, with intent to steal any copper, brass, bell-metal, utensil or fixture being fixed to any dwelling house, out house, coach house, stable, or other building used or occupied with such dwelling house, or thereunto belonging, or to any other building whatsoever, or fixed in any garden, orchard, court yard, fence or outlet belonging to any dwelling house, or other building, — or any iron rails or fencing set up, or fixed in any square, court, or other place (such person having no title or claim of title thereto); or whoever shall be aiding, abetting, or assisting therein, or shall knowingly buy or receive the

“ the same, although the principal felon has not been convicted of stealing the same, shall be guilty of felony, and the court have power to transport such offender for seven years, or to order him or them to be detained in prison, and therein kept to hard labour for any time not exceeding three years, nor less than one year; and, within that time, if the court shall think fit, he shall be once, or oftener, but not more than three times, publicly whipped.”

APPENDIX THE SECOND.

OF OFFENCES AGAINST SHIPS IN DISTRESS, AND BY PLUNDERERS OF THE WRECK.

† IT is enacted by 12 Ann. s. 2. c. 18. “ That all magistrates and officers of every county, corporation, and port town, near the sea, on information of any ship being in distress, shall summon and call together as many civil officers, custom-house officers, and other men, as shall be thought necessary for the assistance and preservation of the said ship, and shall demand of the superior officers of any ship or vessel which shall happen to be riding at anchor near the place, their assistance by their boats, and such hands as they can spare, and on refusal or neglect thereof, such superior officer shall forfeit one hundred pounds. — And it is further enacted, that if any other person than such as shall be empowered by the magistrates as aforesaid, shall enter or endeavour to enter on board any such vessel so in distress, without permission of some one so employed for the preservation of the said ship, such offender may be repelled by force; and if any person shall obstruct the preservation, or deface the mark of any goods saved from the said ship, he shall within twenty days make double satisfaction to the party grieved, at the discretion of the two next justices, or in default be committed to hard labour for twelve months. — And if any goods that were stolen or carried off from any such ship or vessel in distress, shall be found upon any person shall not on demand deliver up the same to the owner, or to his order, he shall forfeit treble the value.”

Made perpetual by 4 Geo. 1. c. 12. but restrained from abridging the jurisdiction of the Cinque ports

† *Sec. 2.* And it is likewise enacted by par. 5. “ That if any person or persons shall make, or be assisting in the making of any hole in the bottom, side, or any other part of any ship or vessel so in distress as aforesaid, or shall steal any pump belonging to any ship or vessel so in distress as aforesaid, or shall be aiding or abetting in the stealing such
“ pump,

" pump, or shall wilfully do any thing tending to the immediate loss or destruction of such ship or vessel, such offender shall suffer death without clergy."

(a) Vide 3 Edw.
1. c. 4.
1 Comm. 290.

† *Stat.* 3. It is also enacted by 26 Geo. 2. c. 19. " That if any person or persons shall plunder, steal, take away or destroy any goods or merchandize, or other effects from or belonging to any ship or vessel which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of his majesty's dominions, (whether any living creature (a) be on board any such vessel or not) or any of the furniture, tackle, apparel, provision, or part of such ship or vessel; or shall beat or wound with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, or the wreck thereof; or if any person or persons shall put out any false light or lights, with intention to bring any ship or vessel into danger, such offender shall suffer death without clergy.—Provided, that when goods or effects of small value shall be stranded, lost, or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence, the offender may be indicted and punished as for petit larceny. The prosecutions to be carried on at the expence of the county, by the clerk of the peace, on pain of forfeiting 100l. for refusing or neglecting the same."

† *Stat.* 4. And it is further enacted by the said statute, par. 11, " That if any sheriff, justice, mayor, magistrate, coroner, and lord of a manor, commissioners of the land-tax, constable, &c. or other person lawfully authorised, shall be assaulted, beaten, and wounded for, or on account of the exercise of his or their duty, in or concerning the salvage or preservation of any ship or vessel in distress; or of any ship or vessel, goods or effects, stranded, wrecked, or cast on shore, or lying under water in any of his majesty's dominions, the offender on conviction at the goal delivery, or at the general or quarter sessions, shall be transported for seven years."

† *Stat.* 5. And it is further enacted, par. 8, " That if the fact be committed in Wales, then the prosecution shall and may be carried on in the next adjoining English county."

At Salop summer assizes, 1774, Parry and Roberts were convicted upon this statute, for an offence committed in Anglesea. It was moved, in arrest of judgment, upon the last mentioned clause, that the trial was erroneous, because Cheshire, and not Salop, was the next adjoining English county to Anglesea. To give the prisoners the benefit of the objection, the fact was taken to be so; and the sentence was respited. But all the judges were of opinion that the conviction was proper; for Chester, properly speaking, is not an English county, and the words of the statute, being merely a description of the law as it existed at the time, must be construed according to the 26 Hen. 3. c. 6. s. 6. which gives jurisdiction to the justices of gaol delivery, " in the counties of England next adjoining."

joining to the lordship or place in Wales where the offence is committed." It is true the 26 Geo. 2. c. 19. s. 8. does not go on to say in the words of the 26 Hen. 8. "where the king's writ runneth." But the case of the King v. Athor, reported in 3th Modern, shews it has been the constant practice ever since to consider Salop as the next adjoining English county. M.S.

APPENDIX THE THIRD.

OF OFFENCES IN TAKING, KILLING, OR DESTROYING FISH.

† IT is enacted by 5 Eliz. c. 21. s. 2. "That whoever shall break, cut down, cut out, or destroy any head or dam of any ponds, pools, motes, stagnes, stews, or several pits wherein fish are or shall happen to be put in or stored withal by the owners or possessors thereof; or do or shall wrongfully fish in any of the said several ponds, pools, motes, stews or pits, to the intent to destroy, kill, take, or steal away any of the same fish, against the will of the owners, shall suffer three months imprisonment, find security for his good behaviour for seven years, and make compensation to the party grieved."

For the offence of trespassing in ponds, by endeavouring to take fish therein, vide 3 Edw. 1. c. 20. 2 In 4. 200. vide also 31 Hen. 8. c. 2. where this offence was made felony.

† *Stat.* 2. And it is also enacted by 4 and 5 Will. 3. c. 23. s. 5. "That no person, except the owner or occupier of a fishery, shall have or keep any net, angle, leap, picche, or other engine for the taking of fish, other than the makers and sellers thereof for their better convenience in the sale of the same, and other than the owner and occupier of any river or fishery for the time being;—and the owner of any river or fishery, or his appointee, may seize, detain, and keep to his own use, all such nets, or other engines which he shall find used or laid, or in the custody of any person whatsoever, fishing in any river or fishery whatsoever, without the consent of the owner or occupier:—and any person being authorised by warrant under the hand and seal of a justice for the county or place, may search in the day time, the houses of persons prohibited to keep the same, who shall be suspected of having the same, and the same and every or any of them to seize, detain and keep to his or their own use, or otherwise to cut in pieces or destroy, as things by this act prohibited to be kept by persons of their degree.—But this shall not extend to fishermen, &c. authorised to fish in navigable rivers or waters, with lawful nets, &c."

† *Stat.* 3. And it is also enacted by 22 & 23 Car. 2. c. 25. s. 7. "That whoever shall use any castin net, or other

On a conviction upon this act, Lord Mans-

"net

field declared
that the offence
provided against,
is the stealing of
fish; taking it
without the leave
or consent of the
owner. And the
words *taking and*
killing mean
stealing. It must
therefore appear
that the fish
killed were not
fish of the party's
killing them, and
that they were
not killed in his
own ponds. 2
Burr. 682.

“ net whatsoever, or any angle, hair noose, trail or spear,
“ or shall lay any wears, pots, nets, fish-hooks, or other en-
“ gines, or shall take any fish by any means or device what-
“ soever, in any river, stew, pond, mote, or other several wa-
“ ters or rivers, or shall be aiding or assisting thereunto, with-
“ out the consent of the owner, on conviction by confession,
“ or the oath of one witness within a month, before one jus-
“ tice, shall render compensation, not exceeding treble damages,
“ and over and above, pay down immediately any sum not ex-
“ ceeding ten shillings, to the use of the poor, and on default
“ by distress, shall be imprisoned, not exceeding one month,
“ in the house of correction, unless the offender shall enter
“ into a bond to the party injured, with one surety not ex-
“ ceeding ten pounds, never to offend in like manner.—Jus-
“ tices may seize the nets, &c. but the party may appeal to
“ the quarter sessions, which shall be final, unless title to any
“ land, royalty, or fishery is concerned therein.”

† *Stat. 4.* And it is also further enacted by the Black act,
9 Geo. 1. c. 22. “ That whoever being armed with swords,
“ fire arms, or other offensive weapons, and having his or
“ their faces blacked, or being otherwise disguised, shall un-
“ lawfully steal or take away any fish out of any river or pond,
“ or shall forcibly rescue any person in lawful custody for the same,
“ or shall by gift or promise of money or other reward, pro-
“ cure any of the king’s subjects to join him or them in any
“ such unlawful act, shall suffer death without clergy.”

† *Stat. 5.* Also it is farther enacted by 5 Geo. 3. c. 14.
“ That whoever shall enter into any park or paddock fenced
“ in and inclosed, or into any garden, orchard, or yard, ad-
“ joining or belonging to any dwelling house, in or through
“ which park or paddock, garden, orchard, or yard, any
“ river, or stream of water shall run or be, or wherein shall
“ be any river, stream, pond, pool, moat, stew, or other
“ water, and by any ways, means, or device whatsoever,
“ shall steal, take, kill, or destroy any fish bred, kept, or pre-
“ served therein, without the consent of the owner thereof;
“ or shall be aiding or assisting in committing the said offence;
“ or shall receive or buy any such fish knowingly, upon con-
“ viction by indictment within six months, before the justices
“ of gaol delivery where such place shall be, shall be trans-
“ ported for seven years. And any offender making a dis-
“ covery of, and convicting his accomplices, is intitled to a
“ pardon.”

† *Stat. 6.* And it is further enacted by the said statute,
par. 3, “ That whoever shall take, kill, or destroy, or at-
“ tempt to take, kill or destroy, any fish in any river or
“ stream, pond, pool, or other water (not being in any park
“ or paddock, or in any garden, orchard, or yard, adjoining
“ or

“ or belonging to any dwelling house, but shall be in any
 “ other inclosed ground which shall be private property) on
 “ conviction by one witness, shall forfeit five pounds to the
 “ owner for every offence, or be committed to the house of
 “ correction not exceeding six months. Any one justice of
 “ the place, upon complaint on oath, may issue his warrant
 “ to bring the offender before him, and the owner may, at
 “ any time within six months, recover the penalty by action
 “ at law, &c. But by par. 5. nothing in this act shall extend
 “ to any person who shall have a just right or claim to take,
 “ kill, or carry away any such fish as aforesaid.

IN a conviction on the above clause, the court declared that it ought to appear that the justice has jurisdiction; that the complaint was made by the owner; and that the fact was committed without his consent. That it must also sufficiently appear, upon oath, that the river, &c. was private property, and who was the owner of it; that the proviso in the fifth section means to except such persons as have especial right to fish in the fishery of another, and that if the owner is the complainant, it would be evidence of his dissent. 4 Burr. 2282.

APPENDIX THE FOURTH.

OF OFFENCES BY INCENDIARIES.

THE CRIME of maliciously burning the house which another is in the possession of, hath been already considered under the title ARSON (a); I shall therefore, in this chapter, recite what other offences, by MALICIOUS INCENDIARIES, are created felonies by statute. (a) Anti, page

† Sect. 1. And first, to repress the daring outrages that formerly prevailed upon the Northern borders of the kingdom, it is, amongst other offences enacted by 43 Eliz. c. 13. s. 2. “ That whoever shall willfully and of malice, burn or cause to be burned, or aid, procure, or consent to the burning of any barn or stack of corn, or grain within Cumberland, Northumberland, Westmorland, or Durham, shall, on conviction at the assizes, or general session of the peace, suffer the pains of death without benefit of clergy.”

† Sect. 2. But these wicked courses growing into frequent, and secret practice in several parts of the kingdom, it is enacted by 22 & 23 Car. 2. c. 7. “ That if any person or persons shall in the night time, maliciously, unlawfully and willingly burn, or cause to be burnt or destroyed, any ricks or stacks of corn, hay, or grain; barns, or other houses or buildings, or kilns, the offenders shall suffer as in cases of felony.”

† *Sec. 3.* But this statute having made the crimes therein mentioned, only single felonies, and some doubt (a) remaining whether the crime of Arson was not intitled to the benefit of clergy, it was thought expedient to extend (b) the provisions of the 22 & 23 Car. 2. c. 7. and it is accordingly enacted. By 9 Geo. 1. c. 22. made perpetual by 31 Geo. 2. c. 42. "That if any person or persons shall set fire to any (1) house, barn, or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay, or wood; or shall forcibly rescue any person being in lawful custody for the same; or shall by gift, promise of money, or other reward procure another to join him or them in any such unlawful act, every person so offending shall suffer death without clergy."—The person injured by this offence may sue the hundred (2) to the amount of two hundred pounds, and a reward of fifty pounds is offered for apprehending, &c. the offender.

(a) *ulter's case*, 11 Coke 20, and *dictum per Gould, J.* in the case of *Rex v. Bireme*, 4 Comm. 223. (b) *Vide* 2 Black. 722.

(1) A prison, the entrance to which is through a dwelling house, is fully within this act; *Rex v. Donnivan*, Black. 682.

2 Str. 1247.

(2) The words wilfully and maliciously, are not inserted in the above clause of the Black act; and it hath therefore been adjudged, that they need not be laid in a declaration against the hundred; for a declaration may follow the statute, however imperfectly expressed. But the court thought it probable that an indictment, for the felony itself, must charge the offence to have been done wilfully and maliciously, for otherwise it is no crime. Black. 243.

† *Sec. 4.* And to encourage and protect plantations of woods, It is enacted by 1 Geo. 1. st. 2. c. 48. s. 4. "That whosoever shall maliciously set on fire, or burn, or cause to be burned, any wood, underwood, or coppice, or any part thereof, shall suffer and be liable to all the penalties and forfeitures as felons by the law now are."

† *Sec. 5.* It is also enacted by 10 Geo. 2. c. 32. s. 6. "That whoever during the continuance of the before-mentioned act of 9 Geo. 1. shall wilfully and maliciously set on fire, or cause to be set on fire, any mine, pit, or delph of coal, or cannel coal, shall suffer death without clergy."

† *Sec. 6.* It is enacted by 9 Geo. 3. c. 29. s. 2. "That whoever shall wilfully or maliciously burn, or set fire to any wind-saw-mill, or other wind-mill, or any water-mill, or other mill, shall suffer death without benefit of clergy.—Provided the prosecution be commenced within eighteen months after the offence committed."

For the offence of throwing squibs and fire-works, vide 10 & 11 Will. 3. c. 7. For burning garments with aqua fortis, &c. vide 6 Geo. 1. c. 23. App. 9. For burning private ships by officers and mariners vide ch. 45. sect. 10. For burning the public property, as ships of war, magazines, stores, &c. vide ch. 12. s. 13, 14. For burning houses by the negligence of servants, vide ante, c. 53. For the offence of threatening to burn houses, barns, &c. vide 27 Geo. 2. c. 15. For burning and destroying engines to draw water out of mines, 9 Geo. 3. c. 29. s. 3. For burning wains, or carts loaded, vide 37 Hen. 8. c. 6. s. 4. For burning the covert for the red and black game, 4 & 5 Will. and Mary, c. 23. s. 12. For burning the covert for preserving deer, vide 28 Geo. 2. c. 19. s. 3.

APPENDIX THE FIFTH.

OF SHOOTING AT ANOTHER,
AND
OF SENDING THREATENING LETTERS.

IT is enacted by the Black act, 9 Geo. 1. c. 22. "That if any person or persons shall, wilfully and maliciously (1) shoot at (2) any person in any dwelling house, or other place; or shall forcibly rescue any person in lawful custody for the said offence; or shall by gift, or promise of money, or other reward, procure any other to join with him or them in such unlawful act, such offenders shall be adjudged guilty of felony, (3) and suffer death without the benefit of clergy."

(1) It has often been said, *that*, by authority, that the word "maliciously" constitutes the offence, and that an act of shooting will amount to felony by the statute, unless, first, it is homicide would have been murder. It is so, therefore, that neither the act, which is neither wilful or malicious; nor a shooting in the street, upon such a provocation, as would, in law, reduce the crime of homicide to a manslaughter can exist; are within the meaning of this statute. O. B. 1730,

vide Arnold's case, 8 St. Tr. 299, for threatening at Lord Onslow.

For the form of an indictment upon this act, see Cir. Court. 155.

It is to be observed, that the offence is not complete until the shot is fired, or the letter is put into the post.

There must be a shooting must be with

the

intent, &c.

11, O. B. 1781, N. 261. And

been determined that this statute creates a new felony, which consequently the quantities incidental to a felony at common law, if several persons be the authors of the offence, and only one is guilty, they are all equally guilty; for the act or crime being considered as a single offence, whoever is present assisting, are adjudged principals in the second degree. (1) In *the latter's case*. — At the last Assizes for Surrey, 1788, Gibbon, Mutton, and Wiggs were tried upon two indictments, to wit: Mr. Perry. The one he bargained, the other upon the statute, and they were found guilty. *Griffin's case* is an instance of a judgment, and the statute was applied. But the prisoners being on conviction of the first offence, the judges never gave any opinion. In a case *last* sent to the Court, where one only, and a single person, had fired, and the evidence left the jury which it was; Mr. Justice Ashurst directed the jury to consider, First, Whether the act or shooting at another had been committed; Secondly, Whether the prisoners were present aiding and assisting; and on a reference, the judges were of opinion, upon the authority of the *Case* never a case, which they recognised as good law, that the question was proper, and the conviction right. M.S.

† *Stat. 2.* It is also enacted by the said statute, par. 14. "That every offence that shall be done or committed contrary to this act, shall and may be enquired of, examined, tried and determined in any (4) county within England, in such manner and form as if the fact had been therein committed. But no attainder upon this act shall work corruption of blood, (5) loss of dower, or forfeiture.

(4) It was determined by the judges, in the case of the King v. Rich. Morris, 11 Geo. 3. see *the case* Mr. Baron Tyre, that this clause gives to a private prosecution.

For the option of proceeding in any county; and that there is no necessity for a special commission. M.S. — (5) An estate came to a conviction on this act, and, as it was corruption of blood, &c., a creditor was permitted to serve him with a writ, in order to obtain a judgment for his debt. Lord Raym. 1372.

† *Sec. 3.* It is also enacted by the said statute 9 Geo. 1. c. 22. "That if any person or persons shall knowingly send any letter, without any name subscribed thereto; or signed with a fictitious name, demanding money, venison, or other valuable thing; or shall forcibly rescue any person being lawfully in custody of any officer or other person for the offences aforesaid; or shall by gift, or promise of money or other reward, procure another to join him or them in any such unlawful act, such offender shall suffer death without benefit of clergy."

† *Sec. 4.* And it is enacted by 27 Geo. 2. c. 15. "That if any person or persons shall knowingly (6) send any letter without any name subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to kill or murder any of his majesty's subjects, or to burn their houses, outhouses, barns, stacks of corn or grain, hay or straw, though no money or venison, or other valuable thing shall be demanded, in or by such letter or letters, or shall forcibly rescue any person in lawful custody for the same, such offender shall suffer death without benefit of clergy."

(6) It has been determined, that proof of the prisoners merely delivering a letter of this kind, to another, without any intimation of where was contained in it, for the purpose of its being conveyed to the prosecutor, is sufficient evidence of his sending it, *knowing the contents*.—And that the offence may be tried by a jury of the county in which the letter was delivered to the prosecutor, although the original delivery, for the purpose of conveying it to him, was in a different county. But it seems, that the threat contained in it, should be conceived in express and unequivocal terms, and not drawn from it by inference or implication. *Rex v. Childwood*, O. B. February session, 1776, upon the unanimous opinion of all the judges. *M.S.* For the threat is the gist of the offence. O. B. Dec. 1784.

No certiorari will lie upon this act to remove an indictment from the justice of Middlesex. *Cowp. 24.*

For the offence of sending a threatening letter to a master wool-comber, &c. &c. vide *Infra.* appendix 10. f. 8.

† *Sec. 5.* And it is further enacted by 30 Geo. 2. c. 24. "That all persons who shall knowingly send or deliver any letter or writing, with or without a name or names subscribed thereto, or signed with a fictitious name or names, letter or letters, threatening to accuse any person of any crime punishable by the law with death, transportation, or pillory, or any other infamous punishment, with a view or intent to extort or gain money, goods, wares, or merchandizes, from the person or persons so threatened to be accused, shall on conviction be put in the pillory, publicly whipped, or fined and imprisoned, or transported, not exceeding the space of seven years, in the discretion of the court."

APPENDIX THE SIXTH.

OF OFFENCES BY SMUGGLERS.

† **SMUGGLING** consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandize, for which the duty has not been paid, or of goods of which the importation or exportation is prohibited. This offence is productive of various mischiefs to society. The public revenue is thereby lessened; the fair trader is injured; and the nation impoverished; rival and perhaps hostile states are thereby enriched; and the persons guilty thereof, being hardened by a course of disobedience to and defiance of law, behave so abandoned and daring as not to hesitate at being guilty of the greatest offences. It is therefore restrained by a great variety of statutes (a) which inflict pecuniary penalties, and seizure of the goods for clandestine smuggling; and affix the guilt of felony, with transportation for seven years, upon mere open daring and avowed practices. But the following statute is, for this purpose, *influx omnium*.

4 Comm. 155.
4 Ral. Abt. 523,
543.
1 Comm. 317.
Reccar. c. 33.
8 Mod. 5.

† *Stat. 1.* And it is accordingly enacted, by 19 Geo. 2. c. 34. "That if any persons, to the number of three or more, armed with fire-arms or other offensive weapons, (1) shall be assembled (2) in order to be aiding and assisting in the illegal exportation of wool or other goods prohibited to be exported, or the carrying of wool or other such goods in order to such exportation, or in the running, landing, or carrying away prohibited or uncustomed goods or goods liable to pay any duties which have not been paid or

(a) 5 Geo. 1. c. 11.
6 Geo. 1. c. 21.
9 Geo. 2. c. 35.
13 & 14 Car. 2. c. 11.
8 Geo. 1. c. 18.

A prisoner committed upon this act, for assisting in running goods is not within the 18 Geo. 2. c. 28.

O. B. 1784,
No. 759.

(1) The weapons must be such as are calculated for the purposes of offence; therefore, where one man had only a common horse-whip, although all the rest of the gang had fire arms, the Attorney General declined to argue the point, and the prisoner was discharged. *See* 1166. So also a hatchet has been thought no offensive weapon within this act, where it was only caught up upon the spur of the occasion, and belonged to the prisoner in the way of his business. *O. B.* 1786, p. 847. So also a large stick, with three natural prongs and a large head, has been held no offensive weapon. *O. B.* 1785, p. 424. But it is impossible for the law to draw a precise line which will hold in all cases as to what shall, or shall not, be called an offensive weapon. It must greatly depend on the circumstances of the case; for it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war should be considered as offensive weapons; bludgeons, clubs, and any thing not in common use; pokers, shovels, to gs, &c. and even a common walking stick, may be offensive weapons, according to the circumstances which accompany the use of them. It is therefore a question of fact for the jury, Whether the instrument was carried for the purposes of offence or not? *O. B.* 1785, p. 780.

(2) It has been laid down, that there must be a clear, premeditated assembling for the express purpose either of landing the goods, or doing the several acts mentioned in the statute; for it is not the intention of the act to include persons, who upon a sudden alarm, join in an attempt to seize. *Vide O. B.* 1784, p. 1071. *O. B.* 1786, p. 100. *O. B.* 1786, p. 970.

O. B. 1784,
No. 320.

“ secured; or in the illegal relanding of any goods, whatsoever which have been shipped or exported upon duty, without licence or certificate; or in rescuing or taking away the same after seizure, from any officer or officers of the customs or excise, or other his majesty’s revenue, or other person or persons employed by him or them, or assisting him or them, or from the place where they shall be lodged by him or them; or in rescuing any person who shall be apprehended for any of the offences made felony by this or any other act relating to the revenues of customs or excise; or in preventing the apprehending of any person who shall be guilty of any such offence; or in case any persons to the number of three or more, to armed as aforesaid, shall be so aiding or assisting; or if any person shall have his face blacked, or wear any vizard, mark, or other disguise, when passing with such goods, (3) or shall forcibly hinder, obstruct, assault, oppose or resist any of the officers of the customs or excise, or other his majesty’s revenue, in the seizing or securing such goods; or if any person or persons shall maim or dangerously wound any officer of the customs or excise, or any other his majesty’s revenue, in his attempting to go on board any ship or vessel within the limits of any of the ports of this kingdom; or shoot at, maim, or dangerously wound him when on board such ship or vessel, and in the due execution of his office or duty, (4) then every person so offending shall be adjudged guilty of felony, and suffer death without benefit of clergy.”

Wile Infr., 13
Geo. 3, c. 10,
s. 10, by which
the offence of
obstructing officers
is made misde-
meanour only.

O. B. 1784,
p. 848, 857.

(2) It has been said, that this clause has no regard to the number of persons, nor to their being armed; and that in individual, with his face blacked, passing with such goods, would, in all probability, be deemed within the act. And that the word, to being counted with the preceding offence, seems also to be a crime which would reach any individual who shall obstruct. O. B. 1784, p. 1671.

(4) On an indictment on this statute the prosecutor must give evidence that the officers acted as revenue-officers, and that the goods were uncustomed; but circumstantial proof is sufficient. O. B. 1784, p. 1002. O. B. 1786, p. 100.

† Sect. 2. And it is further enacted by the said statute, par. 2. “ That if any person or persons shall be charged with being guilty of any of the offences aforesaid, before any one or more of his majesty’s justices of the peace, or before one of his majesty’s justices of the King’s Bench, if the offence be committed in England; or before the lord justice general, or one of the lords of justiciary, or any one or more of his majesty’s justices of the peace in Scotland, if the offence be committed in Scotland; by information of one or more credible person or persons, upon oath by him or them to be subscribed, such justice of the peace, or justice of the King’s Bench, or lord justice general, lord justice clerk, or lord of justiciary respectively, before whom such information shall be made as aforesaid, shall forthwith certify under his hand and seal, and return such information to one of the principal secretaries of state, who

The 26 Geo. 2,
c. 32. 34 Geo.
2, c. 18. 4 Geo.
3, c. 12,
which continue
this present act
at the 19 Geo.
2, c. 34, having
expired some
short time
before the
renewal of
this act, and
it is
renewed by 19
Geo. 2, c. 69,
which still
remains in
force.

“ is hereby required to lay the same as soon as conveniently may be before his majesty in his privy council; whereupon it shall and may be lawful for his majesty, his heirs or successors, to make his or their order, by his or their said privy council, thereby requiring and commanding such offender or offenders to surrender him or themselves within the space of forty days, after the first publication thereof in the London Gazette, to the lord chief justice, or to any other of his majesty's justices of the court of King's Bench, or to any one of his majesty's justices of the peace, if the offence be committed in England; or to any of the lords justiciary, or to any one of his majesty's justices of the peace in Scotland, if the offence be committed in Scotland; who is hereby required upon such offender or offenders surrendering him or themselves, to commit him or them, without bail or main prize, to the county gaol, or to the gaol or prison of the place where he or they shall so surrender, to the end that he or they may be forthcoming to answer the offence or offences wherewith he or they shall stand charged, according to due course of law, which order the clerks of his majesty's privy council shall cause to be forthwith printed and published in the two successive London Gazettes, and to be forthwith transmitted to the sheriff of the county where the offence shall be committed, who shall within fourteen days after the receipt thereof, cause the same to be proclaimed, between the hours of ten in the morning, and two in the afternoon in the market-places upon the respective market-days, of two market-towns (a) in the same county, near (b) to the place where such offence shall have been committed, and a true copy of such order shall be affixed upon some public place in such market-towns. And in case such offender or offenders, shall not surrender him, or themselves, pursuant to such order of his majesty, his heirs or successors, to be made in council as aforesaid, he, or they so neglecting or refusing to surrender him, or themselves as aforesaid, or escaping after such surrender, shall from the day appointed for his or their surrender as aforesaid, be adjudged, deemed, and taken to be convicted and attainted of felony, and suffer death without clergy, if the offence be charged to have been committed in England; and of a capital crime, and suffer death and confiscation of moveables, as in case of a person found guilty of a capital crime, and under sentence for the same, if the offence be charged to have been committed in Scotland. And that it shall be lawful to and for the court of King's Bench, or the justices of oyer and terminer or general gaol delivery, for the county or place where such person shall be, to award execution against such offender and offenders, in such manner as if he or they had been convicted and attainted in the said court of King's Bench, or before such justices of

Vide the case of *Ge. 1st. Collins*, who was arraigned upon a suggestion upon this clause, for not surrendering. O.B. 1-81, No. 492. But, on a subsequent instance, the attorney general insisting to the contrary on the indictment only, the court ordered a *non prosequi* to be entered on the suggestion. O.B. 1775, No. 660.

(a) The market towns should be in both in the suggestion, being for other where the prisoner can not give a satisfactory answer to the point of the suggestion, nor come forward to prove when required that he is not guilty. *Foster* 96. For every law introducing a capital punishment, ought to be strictly pursued. *2 Watson* 155.

(b) *Vide* *Lat. 9.*

“oyer and terminer or general gaol delivery respectively, if the offence be charged to have been committed in England, and that it shall be lawful for the court of Justiciary, or the lords Justiciary in their circuits, to award execution against such offender or offenders in such manner as if he or they, had been found guilty and condemned in the said court of Justiciary, or in the circuit respectively.”

† *Stat.* 3. And it is further enacted by the said statute, par. 3. “That whoever shall after the time appointed as aforesaid, for the surrender of any person or persons so charged upon oath, with any of the offences aforesaid, shall be excoired, harbour, receive, conceal, aid, abet, or succour such person or persons, knowing him or them, to have been so charged as aforesaid, and to have been required to surrender him or themselves, by such order or orders as aforesaid, and not to have surrendered pursuant to such order or orders, being prosecuted for the same within one year after the offence committed, and lawfully convicted thereof, shall be guilty of felony, and transported for seven years.”

Vide 19 Geo. 3.
c. 69.

† *Stat.* 4. And it is further provided, “That nothing, &c. shall hinder any judge, justice of the peace, magistrate or officer, from taking such offender and proceeding against him by the ordinary course of law. The indictment or information may be laid in any county in England, but no attainder shall work corruption of blood.”

Foster 51.
1 Willm. 164.
4 Bac. Ab. 667.
O. B. 1785,
p. 646, p. 772.

† *Stat.* 5. The following constructions have been held upon this statute, First, That it is certainly necessary to suggest the several facts and requisites in the act on the roll, in order to ground a prayer for execution; for they are the several steps which the act requireth to be taken by the crown, in order to bring the prisoner under an attainder: And he may traverse them all, and the offender will not be affected, unless the several requisites mentioned in the act have been complied with in his particular case; and if he traverseth all or any of them, the *onus probandi* lies upon the crown; for this is not like the case of an attainder by act of parliament, in which the facts are settled, the person named, and the only question is, Whether the prisoner is the identical person attainted.

Foster 56

† *Stat.* 6. Secondly, That if the prisoner would take advantage of the insufficiency of the suggestion, *viz.* because the names of the market-towns at which it is enacted the offender shall be proclaimed, is not set forth—he must demur. He cannot take advantage of it on motion.

Foster 56.

† *Stat.* 7. Thirdly, That if the prisoner pleads, he must do it *instantly* and *ore tenus*, as is done in indictments; for there can be no inconvenience in his pleading *instantly* if he intends to

to put the proof of all the matters suggested on the roll upon the crown.

† Sect. 8. Fourthly, that the prisoner is not intitled to a copy of the suggestion. Foster 56.

† Sect. 9. Fifthly, That the words, "near to the place," are restrictive of the sheriff's power, and that the proclamation must be made in the market towns near the place, and not at remote towns, nor at towns even comparatively remote, for though it does not mean at the very next market towns, it would be very dangerous to leave matters of this sort to the discretion of the sheriff merely. Foster 57.

† Sect. 10. Sixthly, That the proceedings at the trial shall be in the same form and manner, as before justices of gaol delivery.

† Sect. 11. It is enacted by 19 Geo 3. c. 69. s. 10. "That whoever shall assault, resist, oppose, molest, obstruct, or hinder any officer or officers of the customs or excise in due seizing or securing any coffee, tea, cocoa nuts, chocolate, foreign brandy, or other foreign spirituous liquors, or any other goods whatsoever, which by any officer or officers of the customs or excise shall or may be liable to be seized by virtue of, or in pursuance of any act now in force; or shall by force or violence rescue, or shall cause to be rescued, any of the said goods, after the same shall have been seized by such officer or officers as aforesaid, or shall attempt or endeavour so to do, or after seizure shall cut, stove, break, or otherwise destroy or damage any casks, vessels, boxes, or package, wherein the same shall respectively be contained; it shall and may be lawful to and for the officers of the customs or excise, and for all persons acting in their aid or assistance, to stop, arrest, and detain, all and every the person and persons so offending, and him her or them forthwith to carry before one or more justice of peace near to the place where the same shall be done, who may commit to the next county gaol till the next general quarter sessions there to be tried in the manner the act directs." Vide 11 Geo. 3. c. 30. for the penalty of obstructing officers and for dispensing with the production of their deputation at the trial, &c.

† Sect. 12. It is also further enacted by 24 Geo. 3. s. 2. s. 11. "That if any person or persons upon the shore, or on board any ship, vessel, or boat, shall maliciously shoot at, or upon any ship, vessel, or boat belonging to his majesty's navy, or in the service of the customs or excise, within the limits of any port, harbour, or creek of Great Britain, or within four leagues from any part of the coast thereof; or if any person or persons being on shore, or on board any ship, vessel, or boat, shall maliciously shoot at, or maim, or dangerously wound any officer or officers of his majesty's navy, or of the customs or excise, N. B. The offender upon this act is subject to tender a surety to be made.

If an offender
against the
statute in re-
spect of the
sale of stolen
goods, or of
the purchase
of stolen goods,
and if he is
found guilty
of a felony,
then his life
is forfeited by
the statute, if
it is a felony
upon which
he may be
acquitted. O. B.
1789, N. 66c.

"whether attempting to go on board, or being on board, or returning from on board any ship, vessel or boat, or otherwise acting in the due execution of his or their duty on shore, or within the limits of any port, harbour, or creek of Great Britain, or within four leagues of any part of the coast thereof,—or shall maliciously shoot at, maim, or dangerously wound any person or persons, aiding and assisting such officer or officers in the execution of his or their duty as aforesaid, then every person so offending, and all and every person being aiding, abetting, or assisting therein, shall be guilty of felony, and suffer death without clergy."

APPENDIX THE SEVENTH.

OF OFFENCES IN BUYING AND RECEIVING STOLEN GOODS.

For the mode of
prosecuting a
felony, see
vide infra, c. 1.
c. 2. & 3. & 4.
c. 5. & 6. & 7.
c. 8. & 9. & 10.
c. 11. & 12. & 13.
c. 14. & 15. & 16.
c. 17. & 18. & 19.
c. 20. & 21. & 22.
c. 23. & 24. & 25.
c. 26. & 27. & 28.
c. 29. & 30. & 31.
c. 32. & 33. & 34.
c. 35. & 36. & 37.
c. 38. & 39. & 40.
c. 41. & 42. & 43.
c. 44. & 45. & 46.
c. 47. & 48. & 49.
c. 50. & 51. & 52.
c. 53. & 54. & 55.
c. 56. & 57. & 58.
c. 59. & 60. & 61.
c. 62. & 63. & 64.
c. 65. & 66. & 67.
c. 68. & 69. & 70.
c. 71. & 72. & 73.
c. 74. & 75. & 76.
c. 77. & 78. & 79.
c. 80. & 81. & 82.
c. 83. & 84. & 85.
c. 86. & 87. & 88.
c. 89. & 90. & 91.
c. 92. & 93. & 94.
c. 95. & 96. & 97.
c. 98. & 99. & 100.

FORASMUCH as thieves and robbers are much encouraged to commit offences, because a great number of persons make it their trade and business to deal in the buying of stolen goods, it is enacted by 3 Will. & Mar. c. 9. f. 4: and 5 Ann. c. 31. f. 5: "That whoever shall buy or receive any goods or chattels, (1) that shall be feloniously taken or stolen from any other person, knowing the same to be stolen, shall be taken and deemed an accessory to such felony after the fact, and shall incur the same punishment as an accessory to the felony after the felony committed." And by 4 Geo. 1. c. 11. Persons convicted of buying or receiving stolen goods, shall be transported for the term of fourteen years.

(1) A person indicted for receiving goods and money; he was proved to have received the money, but the goods were not proved to be stolen; therefore, Willes, C. J. directed his acquittal. For the goods were not proved to be stolen, and it has been frequently explained, that the goods must be the goods and chattels of a person robbed. O. B. 1779: Vide infra. But the person indicted for receiving goods and money, by 2 Geo. 2. c. 25, and the offender liable to the same punishment as a receiver of stolen goods. Therefore, the knowing and receiving of any species of property is liable to punishment like other offenders. Rex v. E. Woods. Select Trials, 3 vol. p. 198. As in the case of the King and Tippings, 11 Geo. 3. it was determined by all the judges, that money and goods are comprehended within the words "goods and chattels," mentioned in the act. N. B. But the true receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law. 1 Hale 600.

§ 7. 2. And it is also enacted by 29 Geo. 2. 30. "That every person who shall buy or receive any lead, iron, copper, brass, bell-metal, or solder, knowing the same to be unlawfully come by; or shall privately buy or receive any stolen lead, iron, copper, brass, bell-metal, or solder, by suffering any door, window, or shutter to be left open or un-

"fastened,

fastened, between sun-setting or sun-rising for that purpose; or shall buy or receive the same, or, any of them, at any time, in any clandestine manner from any person or persons whatsoever, although the principal felon or felons, has not, or have not been convicted of stealing the same, shall, on conviction by due course of law, be transported for fourteen years."

† *Sec. 3.* And it is enacted by the said statute, par. 2. "That any one justice upon complaint on oath, by any credible persons, that there is cause to suspect (a) stolen lead, iron, copper, brass, bell-metal, or solder, to be concealed in any dwelling-house, out house, yard, garden, or other place, by warrant under his hand and seal, may cause the same to be searched, in the day time, and if any of the articles so suspected to be stolen shall be found therein, the same together with the person in whose custody it is found, shall be brought before any two justices of the county or place, and if the said person shall not give an account of the same to the satisfaction of the justices, or shall not within some convenient time, to be set by the said justices, produce the party of, or from whom he bought or received such stolen lead, &c. &c. he shall be adjudged guilty of a misdemeanor — forfeit for the first offence 40s. For the second 4*l.* and for every subsequent offence 6*l.*"

Justices on suspicion may hear and determine.

(a) A bare surmise is not sufficient.

3 Inst. 177.
2 Hale 113, 150.

† *Sec. 4.* And it is further enacted by par. 3. "That every constable, headborough, or tithingman, in every place where they shall be officers, and every beadle in his district, and every watchman, during such time only as he is on his duty, shall apprehend every person who may reasonably be suspected of having, or carrying, after sun setting and before sun-rising, any lead, iron, copper, brass, bell-metal, or solder suspected to be stolen, and carry them before any two justices for the county or place, and if such person do not produce the party from whom he bought or received the same, or some other credible witness to depose upon oath, the sale or delivery of the said lead, &c. or shall not give a satisfactory account how he came by the same, he shall be adjudged guilty of a misdemeanor, and forfeit as aforesaid."

Officers empowered to apprehend suspected persons.

† *Sec. 5.* And it is further enacted, "That on conviction, any two justices may order such lead, copper, brass, bell-metal, or solder, to be deposited with the church-wardens or overseers of the place where it shall be found, or in any other convenient place, for any time not exceeding thirty days, and to order the church-wardens and overseers in every parish within the bills of mortality, to advertise the same, and in every other parish to give notice by the public crier, and by fixing a description of the same, and where deposited,

How the goods are to be disposed of.

“ deposited, on the church door, that the same may be claimed
 “ by the owner, or some reputable person in his behalf. And
 “ in case any person can prove their property, in the same,
 “ upon oath, to the satisfaction of any two justices for the
 “ county or place, they shall order restitution after pay-
 “ ment of the expences, if not, the same shall be sold at
 “ the end of the said thirty days, and after deducting the
 “ charges, one moiety shall be given to the person who shall
 “ apprehend the offender, and the other to the poor of the
 “ parish where the offence is committed, if it is known where,
 “ or otherwise where such conviction shall be made.”

Private persons
 must apprehend
 suspected offen-
 ders.

† *Stat. 6.* And it is further enacted by par. 5. “ That every
 “ person to whom any lead, iron, copper, brass, bell-metal, or
 “ solder, shall be brought and offered to be sold, pawned, or
 “ delivered, shall (there being reasonable cause to suspect
 “ the same were unlawfully come by) apprehend, secure and
 “ carry before a justice of the county or place, where the same
 “ shall be so brought or offered, the person or persons so
 “ bringing or offering the same, together with such lead,
 “ iron, copper, brass, bell-metal, or solder, and such per-
 “ sons so apprehended shall be dealt with, and such articles
 “ shall be deposited and disposed of, in the same manner as if
 “ the offender had been apprehended by the officers before-
 “ mentioned. And if it shall appear upon the oath of any
 “ person, notwithstanding he were concerned in stealing the
 “ same, if corroborated with other credible circumstances, to
 “ the satisfaction of two justices for the county or place where
 “ the same shall be so brought and offered, that there was rea-
 “ sonable cause to suspect such lead, &c. was unlawfully come
 “ by, and that the person to whom the same was so brought
 “ and offered, did not (having it in his, her, or their power
 “ so to do) apprehend, secure, and carry before a justice
 “ as aforesaid, the person or persons who so brought and of-
 “ fered the same, that then the person to whom the same was
 “ offered, shall be deemed guilty of a misdemeanor.”

How the penal-
 ties shall be
 levied and ap-
 plied.

† *Stat. 7.* And it is further enacted, “ That all the said for-
 “ feitures shall be levied by distress, by warrant under the
 “ hands and seals of any two justices, before whom such offen-
 “ der was deemed and adjudged guilty, one moiety to the in-
 “ former, the other to the poor. And on default, the said
 “ justices shall commit the offender to the common gaol, or
 “ other prison, or house of correction within their jurisdiction,
 “ for one month for the first offence, two months for the
 “ second, and for every subsequent offence, until such offen-
 “ der shall be discharged by order of the court of general, or
 “ quarter sessions.”

† *Stat. 8.* And it is further enacted by 2 Geo. 3. c. 28.
 “ That whoever shall buy, or receive any part of the cargo
 “ or

“ or loading of, or any goods, stores, or things of, or
 “ belonging to any ship or vessel in the river Thames, know-
 “ ing the same to be stolen, or unlawfully come by, or shall
 “ privately buy or receive any such goods, stores, or things,
 “ or any part of such cargo or loading, by suffering any door,
 “ window, or shutter to be left open, or unfastened, between
 “ sun-setting and sun-rising for that purpose, or shall buy or
 “ receive the same, or any of them, at any time, in any clan-
 “ destine manner, from any person or persons whomsoever,
 “ although the principal offender has not been convicted of
 “ stealing, or unlawfully procuring the same, shall be trans-
 “ ported for fourteen years.”

Buying stolen
goods from ves-
sels in the river.

† Sect. 9. And it is also enacted by 10 Geo 3 c. 48. “ That
 “ every person who shall buy, or receive any stolen jewel, or
 “ jewels, or any stolen gold or silver plate, watch or watches,
 “ knowing the same to have been stolen, shall, in all cases
 “ where the said goods shall have been feloniously stolen, ac-
 “ companied with a burglary actually committed in the steal-
 “ ing the same, or shall have been feloniously taken by a rob-
 “ bery on the highway, shall be triable as well before convic-
 “ tion of the principal felon, in such felony and burglary,
 “ or robbery, whether he shall be in or out of custody, as af-
 “ ter his conviction, and being convicted thereof, he shall be
 “ deemed guilty of felony, and be transported for the space
 “ of fourteen years.”

Receiving jewels,
&c.

† Sect. 10. And it is further enacted by 21 Geo. 3. c. 69.
 “ That every person who shall buy, or receive any pewter pot,
 “ or other vessel, or any pewter in any form or shape what-
 “ ever, knowing the same to be stolen, or unlawfully come
 “ by; or shall privately buy, or receive any stolen pewter,
 “ by suffering any door, window, or shutter to be left open
 “ or unfastened, between sun-setting and sun-rising for that
 “ purpose; or shall buy or receive the same at any time, in any
 “ clandestine manner from any person or persons whatsoever,
 “ although the principal felon, or felons has not, or have not
 “ been convicted of stealing the same, shall be transported for
 “ any time not exceeding seven years, or kept and detained in
 “ prison, and therein kept to hard labour, for any time not ex-
 “ ceeding three years, nor less than one year, and within
 “ that time (if the court shall think fitting) shall be once,
 “ or oftener, but not more than three times, publicly
 “ whipped.”

Pewter, trans-
ported seven
years

† Sect. 11. And it is further enacted by 22 Geo. 3. c. 58.—
 “ That in all cases whatsoever, where any goods and chattels
 “ (except lead, iron, copper, brass, bell-metal, and solder)
 “ shall have been feloniously taken and stolen, whether the
 “ offence of the person or persons, so taking or stealing the
 “ same, shall amount to grand larceny, or some greater of-
 “ fence,

Offenders may
be tried for the
misdemeanor.
Vide B. a c. 49.

Vide Rex v. Wilkes and Forster.

(a) *Vide the case of William Hallam, indicted for a misdemeanor upon this act, where it was determined that the principal felon may even be admitted to an evidence against the receiver.* (O. B. 1786, p. 214.)

Justice on suspicion may arrest and punish.

Officers may apprehend.

sence, or to petit larceny only (except where the person or persons actually committing the felony, shall have been already convicted of grand larceny, or of some greater offence) every person who shall buy or receive any such goods and chattels, knowing the same to have been so taken or stolen, shall be held and deemed guilty of, and may be prosecuted for a misdemeanor, and shall be punished by fine, imprisonment, or whipping, as the court of Quarter Sessions, who are hereby empowered to try such offender, or as any other court before which he, she, or they shall be tried, shall think fit to inflict; although the principal felon, or felons (a) be not before convicted of the said felony, and whether he, she, or they is, or are amenable to justice or not. And in cases where the felony actually committed, shall amount to grand larceny, or to some greater offence, and where the person or persons actually committing such felony, shall not be before convicted, such offender or offenders, shall be exempted from being punished as accessory or accessories, if such principal felon, or felons shall be afterwards convicted."

† *Sec. 12.* And it is further enacted, "That it shall be lawful for any one justice of the peace, upon complaint made before him upon oath, that there is reason to suspect that stolen goods are knowingly concealed in any dwelling-house, out-house, garden, yard, croft, or other place or places, by warrant under his hand and seal, to cause every such dwelling, or place to be searched in the day time, and the person knowingly concealing the said stolen goods, or any part thereof, or in whose custody the same, or any part thereof shall be found, he, she, or they being privy thereto, shall be deemed guilty of a misdemeanor, and shall be brought before any justice of the peace for the county or place, and made amenable to answer the same, by like warrant of any such justice, and on conviction shall be punished as aforesaid."

‡ *Sec. 13.* And it is further enacted, "That every constable, headborough, or tything-man, in every county or place, where they shall be officers, and every beadle within his ward, or district, and every watchman while on duty, shall and may apprehend those who may be suspected of conveying, after sun-setting, and before sun-rising, any goods or chattels suspected to be stolen; and the same, together with such person or persons, as soon as conveniently may be, to convey or carry before any justice for the county or place, to be dealt with according to law, and on conviction, they shall be held guilty of a misdemeanor, and imprisoned not exceeding six calendar months, nor less than three calendar months."

Sec.

Sec. 14. It is also enacted by the said statute, "That every person to whom any goods or chattels which have been feloniously stolen, or taken, shall be brought and offered to be sold, pawned, or delivered, shall on reasonable cause for suspicion, apprehend, and carry before a justice for the county or place, where the same shall be so offered, the person and persons bringing, or offering the same."

For the pardon allowed to such as shall discover receivers of stolen goods, vide second book, title "pardon."

APPENDIX THE EIGHTH.

OF THE OFFENCES OF RETAKING, AND ADVERTISING A REWARD FOR, STOLEN GOODS.

† It is enacted by 4 Geo. 1. c. 11. s. 4. "That wherever any person taketh money, or reward, directly or indirectly, under pretence, or upon account of helping any person or persons to any stolen goods or chattels, every such person so taking money or reward, as aforesaid, (unless such person doth apprehend, or cause to be apprehended, such felon who stole the same, and cause such felon to be brought to his trial for the same, and give evidence against him) shall be guilty of felony, and suffer the pains and penalties of felony, according to the nature of the felony committed in stealing such goods, in such and the same manner as if such offender had himself stole such goods and chattels, in the manner, and with such circumstances, as the same were stolen."— And by 6 Geo. 1. c. 23. "Whoever shall prosecute an offender upon this statute, to conviction of felony, without benefit of clergy, shall be intitled to a reward of forty pounds."

Post. c. 50. s. 5.
1 Hale 62.
Upon this clause the famous Jonathan Wild was convicted and executed.
10 Geo. 1.

† Sec. 2. And it is further enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo. 2. c. 19. s. 1. "That any person publicly advertising a reward, with no questions asked, for the return of things which have been stolen or lost, or making use of any words in such publick advertisement, purporting that such reward shall be given, or paid, without seizing, or making enquiry after the person producing such thing so stolen, or lost, or promising or offering in any such publick advertisement, to return to any pawnbroker, or other person, who may have bought or advanced money by way of loan upon such thing so stolen, or lost, the money so paid or advanced, or any other sum of money, or reward for the return of such thing; and any person printing, or publishing such advertisement, shall respectively forfeit the sum of fifty pounds for every such offence, to any person who will sue for the same."

This statute is an offence at common law, highly criminal, as being a sort of compounding of felony and punishable by fine and imprisonment. Vide 1 Hale 346.
Post. c. 5. s. 7.
R. 2. c. 29. c. 30.

For the relation of the offence to the common law, vide second book, title "Retaking," and 4 Burn 83.

APPENDIX THE NINTH.

OF OFFENCES BY MALICIOUSLY DESTROYING GARMENTS, HOP-BINDS, COAL-MINES, AND MINE-ENGINES.

Garments.

FIRST. It is enacted by 6 Geo. 1. c. 23. s. 11. "That if any person or persons, shall at any time or times, wilfully and maliciously assault any person or persons in the publick streets, or highways, with an intent to tear, spoil, cut, burn, or deface, and shall tear, spoil, cut, burn or deface the garments, or cloaths of such person or persons, such offenders shall be guilty of felony, and transported for seven years."

Hop-binds.

† *Sec. 2.* Secondly, It is enacted by 6 Geo. 2. c. 37. s. 6. "That if any person or persons, during the continuance of the 9 Geo. 1. c. 22. (which is made perpetual by 31 Geo. 2. c. 42.) shall unlawfully and maliciously cut any hop-binds growing on poles, in any plantation of hops, every person or persons so offending, shall suffer death without benefit of clergy."

† *Sec. 3.* Thirdly, It is also enacted by 13 Geo. 2. c. 21. "That if any person shall divert, or convey any water into any coal-work, with design to destroy, or damage the same, he shall pay to the party grieved, treble damages, with costs"

Mine

† *Sec. 4.* Fourthly, It is also enacted 9 Geo. 3. c. 29. s. 2. "That if any person or persons shall at any time wilfully or maliciously set fire to, burn, demolish, pull down, or otherwise destroy, or damage any fire-engine, or other engine for draining water from collieries, or coal mines, or for drawing coals out of the same; or for draining water from any mine of lead, tin, copper, or other mineral; or any bridge, waggon-way, or trunk, for conveying coals from any colliery, or coal mine, or staith for depositing the same; or any bridge, or waggon-way for conveying lead, tin, copper, or other mineral from any such mine, erected or to be erected, or any fence, or fences, for dividing or inclosing any common ground, or waste land, set up, provided, or made in pursuance of any acts of parliament, such offenders shall be transported for seven years, provided the prosecution be commenced within eighteen months after the offence committed."

APPENDIX THE TENTH.

OFFENCES IN DESTROYING LOOMS, &c. IN CERTAIN BRANCHES OF MANUFACTURE.

† It is enacted by 12 Geo. 1. c. 34. s. 6. "That whoever shall assault or abuse any master wool-comber or master weaver, or other person concerned in any of the woollen manufactures of this kingdom, whereby any such master or other person shall receive any bodily hurt for not complying with, or not conforming, or not submitting to any such illegal by-laws, ordinances, rules or orders *as are mentioned in the act*; or whoever shall write, or cause to be written, or knowingly send, or cause to be sent, any letter or other writing or message, threatening any hurt or harm to any such master wool-comber or master weaver, or other person concerned in the woollen manufacture; or threatening to burn, pull down, or destroy any of their houses or out-houses, or to cut down or destroy any of their trees, or to maim or kill any of their cattle for not complying with any demands, claims, or pretences of any of his or their workmen, or others employed by them in the said manufacture, or for not conforming or not submitting to any such illegal bye-laws, &c. as aforesaid, shall, on conviction, upon any indictment, to be found within twelve calendar months after the offence committed, be transported for seven years.

Master wool-comber.
Vide 3 Hen. 6.
c. 1.
Vide 29 Geo. 2.
c. 13.
30 Geo. 2. c. 18.

† "And by 22 Geo. 2. c. 27, the above clause is extended to journeymen dyers, journeymen hot-pressers, and all other persons employed in or about any of the woollen-manufactures; or in the making of felts or hats; or in the manufactures of silk, mohair, furr, hemp, flax, linnen, cotton, fustian, iron, or leather; or in or about any manufactures made up of wool, furr, hemp, flax, cotton, mohair, or silk, or of any of the said materials mixed one with another. But by 13 Geo. 1. c. 23. s. 17. all prosecutions shall be within three months after the offence committed."

Journeymen.

† *Sec. 2.* It is also enacted, by 4 Geo. 3. c. 37. s. 16. "That whoever shall break into any house, shop, cellar, vault or other place or building, or by force enter into any house, shop, cellar, vault, or other place or building, with intent to steal, cut or destroy any linnen yarn, or any linnen cloth, or any manufacture of linnen-yarn, belonging to any manufactures, or the looms, tools, or implements used therein; or shall wilfully or maliciously cut in pieces or destroy any such goods, either when exposed to bleach

linen yarn

or

"or dry, shall suffer as in cases of felony without benefit of clergy. But this act shall not extend to Scotland or Ireland."

Woollen goods

† *Stat. 3.* And it is enacted by 22 Geo. 3. c. 40. "That whoever shall by day, or by night, break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any serge, or other woollen goods in the loom, or any tools employed in making thereof; or shall wilfully and maliciously cut or destroy any such serges, or woollen goods, in the loom, or on the rack; or shall burn, cut, or destroy any rack on which any such serges, or other woollen goods are hanged in order to dry; or shall wilfully and maliciously break, or destroy any tools used in the making any such serges, or other woollen goods, not having the consent of the owner so to do, shall be guilty of felony without benefit of clergy."

Silk goods.

Stat. 4. And it is further enacted by the said statute par. 2. "That whoever, by day or by night, shall break into any house or shop, or enter by force into any house or shop, with intent to cut or destroy any velvet, wrought silk, silk mixed with any other materials, or other silk manufacture, in the loom, or any warp, or shute, tools, tackle, or utensils; or shall wilfully or maliciously cut or destroy any velvet, wrought silk, or silk mixed with any other materials, or other silk manufacture in the loom, or any warp or shute, tools, tackle, or utensils prepared or employed, in, or for the making thereof; or shall wilfully and maliciously break or destroy any tools, tackle, or utensils, used in, or for the weaving or making of any such velvet, wrought silks, or silks mixed with other materials, or other silk goods, or silk manufacture, not having the consent of the owner so to do, shall be guilty of felony, without benefit of clergy."

Linnen and
cotton goods.

+ *Stat. 5.* And it is further enacted by the said statute par. 3. "That whoever, by day or by night, shall break into any house or shop, or enter by force into any house or shop, with intent to cut and destroy any linnen or cotton, or linnen and cotton mixed with any other materials, or other linnen or cotton manufactures, in the loom; or any warp or shute, tools, tackle, and utensils; or shall wilfully and maliciously cut, or destroy any linnen or cotton, or linnen or cotton mixed with any other materials, or other linnen and cotton manufactures in the loom, or any warp or shute, tools, tackle, and utensils, prepared for, or employed in the making thereof, or shall wilfully and maliciously break and destroy any tools, tackle, and utensils, used in and for the carding, spinning, weaving, preparing, or making in any way

“ way whatever, any such linnen or cotton, or linnen or cotton
 “ mixed with any other materials, or other linnen and cotton
 “ goods, or linnen and cotton manufactures whatsoever, not
 “ having the consent of the owner so to do, shall be guilty
 “ of felony without benefit of clergy.”

Vide 1 Black.
 304, how far
 Search manu-
 facture is the
 manufacture of
 England.

APPENDIX THE ELEVENTH.

OF OFFENCES IN NOT PERFORMING QUARANTINE.

† IT is enacted by 26 Geo. 2. c. 26. “ That all ships and
 “ vessels arriving, and all persons, goods, and merchan-
 “ dizes coming or imported from any place from whence the
 “ privy council shall judge it probable that the infection may be
 “ brought, shall be obliged to make their quarantine in such
 “ place, for such time, and in such manner as shall be directed
 “ by the king’s order in council, ratified by proclamation, or
 “ published in the *Gazette*, and that during such appointed pe-
 “ riod, no person, goods, or merchandizes, shall come, or be
 “ brought on shore, or go, or be put on board any other ship,
 “ or vessel, without permission, and under such regulations,
 “ as shall be ordered by the king in council, as aforesaid.”

Vide i fac.
 1.
 c. 3. 8 Geo. 1.
 c. 8. continued
 by 21 Geo. 3.
 c. 29. s. 6. 1
 Geo. 2. c. 17.
 6 Geo. c. 34.
 26 Geo. 2. c. 6.
 28 Geo. 2. c. 4.
 for other provi-
 sions respecting
 quarantine, vide
 33 Geo. 2. c. 16.

† Sec. 2. And it is further enacted by par. 2. “ That if the
 “ plague shall appear on board any ship, being to the north-
 “ ward of Cape Finisterre, the commander shall immediately
 “ proceed, by 29 Geo. 2. c. 8. to the harbour of St. Helens
 “ Pool, or to such other place as the privy council shall ap-
 “ point, and from thence cause intelligence of the condition
 “ of his ship to be given to the secretary of state. But if he
 “ shall not be able to make Scilly, or is forced to go up either
 “ of the Channels, he shall not presume to enter with such ship
 “ into any port, but shall remain in some open road, avoid-
 “ ing all intercourse whatever, with other ships, until the
 “ king’s pleasure be known, on pain of being adjudged
 “ guilty of felony without benefit of clergy.”

† Sec. 3. And it is further enacted par. 3. “ That whenever
 “ any country is infected with the plague, or the privy council
 “ shall as aforesaid, have made any order for performing of
 “ quarantine, the officer appointed for the purpose, shall at
 “ a convenient distance, as often as any ship or vessel, shall
 “ attempt to enter any port or place, demand of the comman-
 “ der every particular (as specified in the act) concerning
 “ the same, and in case it shall appear that any person then on
 “ board such ship or vessel, shall at the time of such examination

“ be actually infected with the plague, or that such ship is
 “ obliged to perform quarantine, having come from any place
 “ visited with the plague, any of the king’s ships, &c. may
 “ by force and violence oblige her to repair to the place
 “ appointed for performing quarantine. And in case the com-
 “ mander of such ship or vessel, conceal the same, he
 “ shall suffer death without clergy. And in case such
 “ commander do not make a true discovery in any other of the
 “ particulars directed by the act, he shall forfeit 200 l. and if
 “ he do not repair to the place appointed, 500 l. And any
 “ persons who attempt to quit the vessel, shall be obliged
 “ to return, suffer imprisonment for six months, and for-
 “ feit 200 l.”

† *Sec. 4.* And by par. 8. “ If any person obliged to
 “ perform quarantine, as aforesaid, shall wilfully refuse or ne-
 “ glect to repair, within convenient time, after notice, to
 “ the house, lazaret, or other place, (as directed by the act to
 “ be provided) or having been placed therein, shall escape, or
 “ attempt to escape out of the same before *quarantine* fully per-
 “ formed, it shall be lawful for the officer appointed, by force,
 “ to compel his return, and every person so refusing, or ne-
 “ glecting to repair after such notice as aforesaid, into such
 “ house, lazaret, or other place; and also every person actually
 “ escaping as aforesaid, shall suffer death without clergy.”

† *Sec. 5.* And it is further enacted by the said statute, par.
 10. “ That if any person not infected with the plague, nor
 “ liable to perform quarantine, shall enter any house, la-
 “ zaret, or other place, appointed as the act directs, whilst any
 “ person or persons infected with the plague, or being under
 “ quarantine shall be therein, and shall return, or attempt to
 “ return, from thence without permission, by order of privy
 “ council, the officer may compel him to return. And in case
 “ such person shall actually escape out of such house, lazaret, or
 “ place appointed as the act directs, before the full perfor-
 “ mance of quarantine, he shall suffer death without clergy.
 “ If the officer neglects his duty, he shall forfeit 100 l. and if
 “ he embezzle any goods, he shall pay treble damages.”

† *Sec. 6.* And it is further enacted par. 18. “ That if any
 “ person or persons, shall knowingly, or wilfully, con-
 “ ceal from the officers of *quarantine*, or shall clandestinely
 “ convey any letters, goods, wares, or merchandizes from any
 “ ship under *quarantine*, or liable to perform quarantine as
 “ aforesaid, or from any lazaret, or other place where goods
 “ shall be performing *quarantine*, every such offender shall suf-
 “ fer death without clergy.”

APPENDIX THE TWELFTH.

OF HINDERING THE EXPORTATION OF CORN.

IT is enacted by 11 Geo. 2. c. 22. "That whoever shall wilfully and maliciously beat, wound, or use any other violence to or upon any person or persons, with intent to deter or hinder him or them from buying of any corn or grain in any market or other place within this kingdom; or shall unlawfully stop or seize upon any waggon, cart, or other carriage, or horse loaded with wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market-town, or sea port of this kingdom, and wilfully and maliciously break, cut, separate, or destroy the same, or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take off, drive away, kill, or wound any such horses, or unlawfully beat or wound the driver or drivers of such waggon, cart, or other carriage, or horse so loaded, in order to stop the same; or shall, by cutting of the sacks, or otherwise, scatter or throw abroad such wheat, flour, meal, malt, or other grain, or shall take, or carry away, spoil, or damage the same or any part thereof; on conviction by two justices of the peace, or at sessions, shall be sent to the common gaol, or house of correction, to hard labour, not exceeding three months, nor less than one, and be once publickly whipped during the said confinement."

To assault with intent to hinder a misdemeanour.

† *Secl.* 2. And it is further enacted, par. 2. "That if any such person or persons so convicted shall commit any of the offences aforesaid a second time, or if any person or persons shall wilfully and maliciously pull, throw down, or otherwise destroy any store-house or granary, or other place where corn shall be then kept, in order to be exported; or shall unlawfully enter any such store-house, granary, or other place, and take and carry away any corn, flour, meal, or grain therefrom, or shall throw abroad or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and shall wilfully and maliciously take and carry away, cast, or throw out therefrom, or otherwise spoil or damage any meal, flour, wheat, or grain therein, intended for exportation, every person so offending, shall, on conviction, be transported for seven years; and if such convict shall return, &c. he shall suffer death as a felon, without benefit of clergy; but without corruption of blood, loss of dower, or disinherittance."

A second offence, or to destroy any granary &c. felony.

liable.

died

† *Stat. 3.* And it is further enacted, "That the hundred where any such offence shall be committed, shall make full satisfaction and amends, not exceeding one hundred pounds, to any party injured, or their representatives, for the damages they sustain by any offender against this act, to be recovered as directed by the statute of hue and cry, 27 Eliz. c. 13. But the party shall give notice to a constable within two days after the fact; and before the expiration of ten days after such notice, shall give in his examination as act directs; and if any one of the offenders be convicted in twelve months, the hundred is released. No actions, therefore, shall be brought before the expiration of one year, nor after the expiration of two years."

APPENDIX THE THIRTEENTH.

OF THE OFFENCE OF RETURNING FROM TRANSPORTATION.

Transportation to America.

(1) If the condition of the king's pardon shall be, that he departs the realm within fourteen days from the day of his discharge from prison, it has ruled that daily book which is kept by the clerk of the papers for the prisoner in which the discharges and commitments are entered, is admissible evidence to prove the time and fact of the discharge, altho' it is the duty of another officer to discharge the prisoners, and the clerk of the papers has no personal knowledge of the fact. O. B. 1785, p. 1137, 1138.

† **A**L L offenders convicted of grand or petit larceny, or any other felonious taking, except the buying or receiving of stolen goods, whose crimes are *within* the benefit of clergy, and for which they are liable only to be burned in the hand or whipped; and also all offenders whose crimes, on conviction, exclude them from the benefit of clergy, to whom his majesty shall extend his royal mercy, on condition of *such* transportation, (1) signified under the great seal, by one of the principal secretaries of state, shall, and may be transported to America (2) for seven years; and all offenders convicted of knowingly buying or receiving stolen goods, to whom such conditional mercy shall be extended, generally shall be transported to America for the term of fourteen years or such other term as shall be made part of such condition. And it is thereupon further enacted, by 4 Geo. 1. c. 11. s. 2. "That if any offender or offenders so ordered to be transported for any term of seven years or fourteen years, or other time or times as aforesaid, shall return into any part of Great Britain or Ireland, before the end of his or their said term, he or she so returning as aforesaid, shall be liable to be punished as any person attainted of felony without the benefit of clergy, and execution shall and may be awarded against such offender or

(2) And it has been determined by all the judges, upon a question arising on the fishing act, referred by Mr. Justice Rathurst, that when an act of parliament says generally that an offender shall be transported, without saying where, it shall be to America. O. B. 1785, p. 1142.

" offenders

“offenders accordingly.” Provided nevertheless, “That the king may at any time pardon, and dispense with any such transportation, and allow of the return of any such offender or offenders from America, upon the terms as described in the act.”

† *Sec. 2.* And whereas some felons ordered for transportation, have already, and others may, come on shore, and return to Great Britain before they have been actually transported to America, or may break gaol, or escape before such transportation. It is thereupon enacted, by 6 Geo. 1. c. 23 f. 6. “That if any felon or felons who shall be ordered for transportation, shall be afterwards at large within Great Britain, without some lawful cause, before the expiration of the term for which such felon or felons was, were, or shall be ordered to be transported, all and every such person and persons, being thereof lawfully convicted, (3) shall suffer death as in cases of felony, without benefit of clergy.”

(3) If the prisoner, upon his trial, confesses the fact, and acknowledges he is

the man, the court will record his confession. O. B. 1784, p. 56. But, otherwise, the record of his conviction must be produced; it must correspond with the averments in the indictment, and evidence must be given of his identity. O. B. 1785, p. 1137.

† *Sec. 3.* And to the intent that such conviction may be as little trouble as possible, It is further enacted by par. 7. “That such offender may be tried either before justices of assize, oyer and terminer, or gaol delivery for the county, city, or place from whence he was ordered to be transported; and that the clerk of the assize and the clerk of the peace where such orders for transportation shall be made, shall, at the request of the prosecutor, or any other in his majesty’s behalf, certify a transcript, briefly and in few words, containing the effect and tenor of every indictment and conviction of such man or woman, and of the order or contract for his or her transportation, to the justices of assize, oyer and terminer, or gaol delivery where such man or woman shall be indicted; which shall, on production of it, be a sufficient proof of the former conviction and order for transportation.”

Made of trial.

† *Sec. 4.* And whereas many felons who have agreed, upon certain conditions, to transport themselves, either for life, or for some term or number of years, have already, and may hereafter come on shore or return, It is enacted, by 16 Geo. 2. c. 15. “That if any felon or other offender already ordered, or hereafter to be ordered for transportation, or who hath already, or hereafter shall agree to transport him or herself, on certain conditions, to America, either for life or any number of years, shall be afterwards at large, without in any part of Great Britain, without some lawful cause,

Convicts transporting themselves, &c.

“ before the expiration of the term for which he or she were
 “ so ordered to be transported, or had so agreed to transport
 “ him or herself; all and every such person or persons being
 “ thereof lawfully convicted, shall suffer death without benefit
 “ of clergy.”

† *Stat.* 5. Whereas offenders excluded from the benefit of clergy are frequently reprieved by the judge who tries them, and, upon his recommendation, may receive mercy on condition of transportation to America for life or for the term of fourteen years; it is enacted by 8 Geo. 3. c. 15. “ That where, upon such recommendation, such offenders shall receive mercy as aforesaid, signified by a principal secretary of state, to the judge so recommending, it shall be lawful for every such judge to make an order for the immediate transportation of every such offender, which shall be as good and effectual, and be considered as if the same had been made during the continuance of the assizes at which such offender was, or shall be convicted.” “ But if such offender
 “ so ordered for transportation shall be afterwards at large,
 “ within any part of Great Britain, without some lawful
 “ cause, (4) before the expiration of the term for which such
 “ offender shall have been ordered to be transported, every
 “ such person being thereof lawfully convicted, shall suffer
 “ death without benefit of clergy, and shall be tried in like
 “ manner as *other felons* found at large before the expiration
 “ of their term.”

(4) Maximilian Mill was convicted at O. B. January sessions, 1771, and ordered for transportation for seven years. He obtained mercy, under the sign manual, on condition of his giving security to the satisfaction of the Recorder to stand out himself for that term. He gave the security, and was accordingly admitted to bail, but did not go abroad. In December 1771, following he was indicted again for being at large, &c. He offered the sign manual in evidence, but that being rejected, he was found guilty, subject to the opinion of the judges, First, Whether the sign manual ought to have been received? Secondly, Whether it could have availed the prisoner, as he had not *spontaneously* returned the conditions of his pardon? All the judges, except Dr. Grey, C. J. were unanimous that the evidence ought to have been received; and that the prisoner having complied with the literal import of the condition, in giving the security which authorized the judge to bail him, it was a *good cause* for him to appear at large, and therefore ought not to have been convicted. Black, 707. It is said, however, that no judicial determination was ever communicated upon this case, but that the prisoner was, in fact, remanded to his former sentence. O. B. 1785, p. 1140, 1145. And this appears to be the practice, viz. Patrick Maun's case. And the case of Aikles, O. B. 1785, No. 902.

Transportation
 beyond the seas.

Continued to
 the 18th of June
 1783, by 24
 Geo. 3. c. 56.

† *Stat.* 6. But America having at length separated from its connection with Great Britain, The punishment of felons and other offenders by transportation to the plantations, was attended with many difficulties. And it is therefore enacted by 19 Geo. 3. c. 74. “ That when any person in Eng-
 “ land, or Wales, shall be lawfully convicted of grand or petit
 “ larceny, or any other crime for which he is liable to be
 “ transported to America, such person shall, if the court shall
 “ think fit, be ordered to be transported to any parts beyond

“ the seas, whether the same be situated in America, or elsewhere, in such and the like manner, and for the same term; as, and for which such person is, or shall be liable to be transported to America.”

Barrington on the statutes, p. 445, to 447.

† *Sec. 7.* And it is further enacted by the said statute, par. 2. “ That when any such person, who shall be so convicted, shall, in consequence thereof, be ordered to be transported to any parts beyond the seas. Or if his majesty shall extend his mercy to any offender, convicted or attainted of any felony excluded from clergy, upon condition of (a) transportation to any parts beyond the seas, as aforesaid, then in any such cases all laws, statutes, usages, and customs now in force, with regard to transportation to America, and their punishment for being afterward at large, within any part of Great Britain, before the expiration of the several terms for which they were ordered to be transported, or had agreed to transport themselves, and particularly the several provisions contained in the 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo. 2. c. 15. and the 8 Geo. 3. c. 15. shall take place and be in force and enure, with regard to the transportation of such offenders, and with regard to their punishment for being afterwards at large as aforesaid, in like manner as if the same had been repeated, and specially inserted in this act.” (5)

(a) For the form in which conditional pardons are now worded, vide B. 2. c. 37.

(5) Aikles was convicted, O. B. Sessions, 1784, of felony. He received his majesty's pardon on condition of departing the realm within fourteen days, giving security for his good behaviour, and in consequence thereof he was discharged out of Newgate on the 6th of March, 1785, of a warrant under the hand and seal of the Recorder. On the 26th of May following, he was apprehended, and afterwards indicted for being at large in Great Britain before the expiration of the term, without any law, usage, &c. Upon these facts being proved, several questions arose.—The 16 Geo. 2. c. 15, inflicts death upon the return of a person who shall have been transported to America. Aikles had only agreed to transport himself to America. The 19 Geo. 3. c. 74, inflicts death upon the return of a person who shall have been transported to America, who shall be convicted of felony, and who, in consequence thereof, had been ordered to be transported to America. Aikles had only agreed to transport himself in consequence of the king's pardon, and was not convicted of felony. It was then contended that the prisoner was not, immediately, with operation of these statutes. But Aikles had broken the condition of the king's pardon, in not departing the realm within fourteen days from his discharge, and upon the argument in this case seems to be the opinion, that the whole grant was, in consequence of the violation of the condition, entirely done away. This consideration gave birth to the question, whether a person within these words of 19 Geo. 3. “lawfully convicted of felony, and who, in consequence thereof, had been ordered to be transported to America, and who, in consequence thereof, had been ordered to be transported to America,” was a person who had been ordered to be transported to America, and who, in consequence thereof, had been ordered to be transported to America. But it was contended, upon the authority of *Milner's case* before mentioned, that, having complied with a part of the condition, by giving security, which, though otherwise expressed, must necessarily be precedent; the legal discharge obtained in consequence of it, by virtue of the Recorder's warrant, formed a *lawful cause for being at large*, which was not interrupted by the violation of the further condition, “that he should depart the realm within fourteen days, &c.” These several questions furnished ingenuity with argument, and produced the sentiments of judges, highly respectable indeed, upon points of criminal law; but this question never came to an ultimate decision. It appeared upon further evidence, that the prisoner had a real intention to quit the kingdom, which had been detected by unaffected poverty, distress, and ill health. The jury, under the direction of the court, thought these circumstances amounted to a *legal excuse*, and the prisoner was accordingly acquitted, and remanded to his former sentence. O. B. 1785, No. 901.

Labour on board
the hulks.

† *Stat.* 8. It is also enacted by par. 27. "That male offenders, convicted of any crime, except petit larceny, for which they are liable to transportation, may in lieu thereof, if the court shall think fit, be punished by being kept on board ships or vessels, (commonly called the hulks) and employed in raising sand, soil, or gravel from the river Thames, &c. &c. for such term, not less than one year, nor exceeding five years. Or, in case such offender shall be liable to be transported for fourteen years, not exceeding seven years, as the court shall think fit to order and adjudge."

(a) Vide ti
act.

† *Stat.* 9. And it is also enacted par. 28. "That where any male offender shall be lawfully convicted of any robbery, or other felony without benefit of clergy, and mercy, notified in writing, by a secretary of state as aforesaid, shall be extended to such offender, upon condition of being kept to hard labour, during any specified term, such mercy may be allowed in the same manner, as if there was a conditional pardon, under the great seal, and the court (a) may, and shall order such offender to be kept to hard labour, as aforesaid, for the time specified in the notification from the secretary of state."

N. B. Th's act
inflicts the pu-
nishment of

for
not being able
to bear labour
during the term
of his punish-
ment, in any of the
houses of confine-
ment, or in the
hulks, shall be
punished by

either
But,

† *Stat.* 10. It is therefore further enacted by the said statute of 19 Geo. 3. c. 74. "That if any person who hath been ordered to hard labour, instead of transportation, shall break from the custody of the keepers, or escape, they shall be punished by an addition of three years to the term for which he, or she, at the time of his, or her breach of prison, or escape was subject to be confined, and if such person so punished by such addition to the term or confinement, shall afterwards be convicted of a second escape, or breach of prison, he or she shall be adjudged guilty of felony, without benefit of clergy."

execution, &c. infamies

Transportation
to such place
the king shall
appoint.

11. But the difficulty of immediately finding proper places beyond the seas, for the purposes of transportation; and it being found impracticable to carry all the provisions of the 19 Geo. 3. effectually into execution. It is enacted by 24 Geo. 3. *stat.* 2. c. 56. which has continuance to the 1 June 1787, That where offenders shall be convicted at the assizes, or sessions, in the manner, and under the circumstances before mentioned, set forth more at large, under title transportation at the end of chapter 33, in the second book, "of offences for which such offenders shall be liable to be transported, &c. it shall, and may be lawful for the court to order and adjudge, that such offenders so convicted, shall be transported beyond the seas, for any term of years, not exceeding the number for which they are liable to

"be

“be transported. And that in every such case it shall and may
“be lawful for his majesty, by, and with the advice of his pri-
“vy council to declare and appoint to what place, or places,
“part, or parts beyond the seas, either within his majesty's
“dominions; or elsewhere, out of his majesty's dominions,
“such felons, or other offenders shall be conveyed or trans-
“ported.”

† *Seet. 12.* And it is further enacted by par. 5. “That if
“any offender who shall be so ordered, by any such court as
“aforesaid, to be transported beyond the seas, or who shall
“agree to transport himself, or herself, on certain conditions,
“either for life, or any number of years, to any such place, or
“places, part, or parts, as shall be appointed by his majesty,
“in manner aforesaid, shall be afterwards at large in Great
“Britain, or Ireland, without some lawful cause, before the
“expiration of the term for which such offender or of-
“fenders, shall have been ordered to be transported be-
“yond the seas, or shall have so agreed to transport
“himself, or herself, as aforesaid, every such offender being
“at large, as aforesaid, being thereof lawfully convicted, shall
“suffer death without benefit of clergy.”

Death to return

N. B. The same mode of trial is appointed as by Act. 3. *supra*.

† *Seet. 13.* And it is further enacted by 25 Geo. 3. c. 46. “That when any person or persons, shall be lawfully
“convicted, before any court competent for the trial of crimes
“in Scotland, of any offence for which the punishment of
“transportation may be inflicted, the court may adjudge such
“person or persons, to be transported beyond the seas, in like
“manner as is now in use, and his majesty, by and with the
“advice of his privy council, may declare and appoint what
“place or parts beyond the seas, either within his majesty's
“dominions, or elsewhere out of his dominions, such offen-
“ders shall be conveyed or transported.”

Offenders in Scotland may be transported.

Seet. 14. And it is also further enacted, “That when
“his majesty shall extend his mercy to any offender under
“sentence of death in Scotland upon condition of transpor-
“tation, signified by one of the principal secretaries of state,
“it shall be lawful for any court, having authority, to allow
“such offender, the benefit of a conditional pardon,
“and (except in cases where such offender shall be autho-
“rized by his majesty to transport himself) to order the same
“in the manner the act describes.”

Judges may allow a pardon on that condition.

† *Seet. 15.* And it is further enacted, “That if any offen-
“der in Scotland, ordered for transportation, and such order
“cannot be conveniently executed, with respect to the place in
“such order mentioned, it shall be lawful for any two or more of
“the judges of the court of Justiciary, to order that such offen-
“der

To such place as his majesty shall appoint.

“ der shall be transported to any other part beyond the seas,
 “ which shall have been appointed by his majesty as aforesaid.”

Returning,
 death without
 clergy.

+ *Sec.* 16. And it is enacted by par. 3. “ That if any of-
 “ fender or offenders, who shall be so ordered by ~~such~~ court as
 “ aforesaid, to be transported beyond the seas, or who shall
 “ agree to transport himself or herself, on certain conditions,
 “ as aforesaid, or who shall be so ordered by two judges of
 “ the Justiciary, shall be afterwards at large in Great Britain
 “ or Ireland, without some lawful cause, before the expiration
 “ of the term for which such offender shall have been ordered
 “ to be transported beyond the seas, or shall have so
 “ agreed to transport himself, or herself, or shall have been
 “ so ordered by two justices of the court of Justiciary, as
 “ aforesaid, every such offender, on being thereof lawfully con-
 “ victed, shall suffer death as in cases of felony, without the
 “ benefit of the clergy, by the law of England; and such offen-
 “ der being found at large in Scotland may be tried there be-
 “ fore any court of competent jurisdiction for the trial of the
 “ original offence.”

APPENDIX THE FOURTEENTH.

OF ASSAULT WITH INTENT TO ROB.

THE old maxim of the criminal law, that *voluntas reputabitur pro facto* (a) continued to prevail in the reign of Henry the Fourth; and it was then agreed that if a man was indicted that *il gisoit deprædando* it was felony (b)—But in the ninth year of Edward (c), a different doctrine began to be held; and men were no longer punished for crimes which they only meditated, but had not actually committed (d); and since that time the bare intention to commit a felony has been considered as a misdemeanor only, and punishable by fine, imprisonment, &c. (e)

(a) 25 Edw. 3.
pl. 32.

27 Affize 38.
1 Hale 532.

(b) Year book,
13 Hen. 4. 85.

(c) Year book,
pl. 26. b.

S. P. C. 27. b.
(d) Reeves' His-

tory of English
law, 3 vol.
p. 413.

(e) Plowden 259. Cases tempus Hardwick, 3 Inst. 68.

Sett. 1. But the punishment as a misdemeanor, not being found sufficiently terrific to restrain the frequency of the offence it is recited by 7 Geo. 2. c. 22. that whereas many of his majesty's subjects have of late frequently been put in fear and danger of their lives, by wicked and ill disposed persons, assaulting and attempting to rob them; and whereas the punishment of such offenders is not adequate to the heinousness of the crime, nor sufficient to deter wicked persons from such attempts; to the end therefore that all persons may be deterred from committing such offences, and for the greater punishment of such offenders, and for the more effectually preventing the like mischiefs in future. It is enacted, "that if any person or persons, with any offensive weapon, or instrument unlawfully and maliciously, shall assault, or shall by menaces, or in or by any forcible or violent manner, demand any money, goods or chattels, of or from any other person or persons, with a felonious intent to rob, or commit robbery upon such person or persons, that then the offender, &c. shall be adjudged liable to be transported for seven years."

Sett. 2. And it is also enacted, "That if such offender shall break gaol, or escape before transportation, or return before the expiration of the seven years, he shall suffer death without benefit of clergy."

Upon

Upon this act the following constructions have been made.

† *SecT. 3.* First, that to compleat the crime not only the assault, as by holding a pistol towards a coachman on his box and telling him to stop; but a demand of the money or other property must also actually be made.—But in this case (a) it was said by *Mr. Justice Chapple*, who tried the prisoner, that the demand need not be made in *express* terms, for that a dumb man may make a demand, as if he stop a person on the highway, and put his hat into the coach with a pistol in his hand.

(a) The case of
Peter Pertalt,
O. B. Dec. Sess
1740. present
Ch. Jus. Willes
who accorded to
Chapple's opinion,
and the prisoner was thereupon acquitted, M. S. Vide Howard's case, O. B. 1783. No. 533.

† *SecT. 4.* Secondly, that both the assault and the demand must be made upon the person intended to be robbed, for the words of the act are “that if any person shall assault, &c. and demand the money &c. of any other person, with intent to rob, or commit robbery upon, *such person.*” (b)

(b) Thomas's
case, O. B. July
Sess. 1784. by Mr. Just. Ashurst.

† *SecT. 5.* Thirdly, that the assault must be made with an offensive weapon, and that the evidence must prove the assault was made with an offensive weapon of the same kind as that which is laid in the indictment.

† *SecT. 6.* Fourthly, that it is not necessary that the indictment should charge the intention to have been, in the very words of the statute “to rob or commit robbery”—it is sufficient if it be laid “with a felonious intent to take his monies from his person and against his will, feloniously to steal, take and carry away” but that it would be more correct if the words “by force or violence” were added (b)

(c) Rumbold's case,
O. B. O. B. 1781
Sess. 1783. Mr. Serjeant Adair, Recorder.

CHAPTER THE FIFTY-NINTH.

OF MISPRISION OF FELONY.

OFFENCES more immediately against the subject, not capital, are either misprision of felony, or other inferior offences. 3 Inst. 36.
1 Hale 374, 375.
652, 708.

Sec. 1. It is said, that every felony includes misprision of felony, and may be proceeded against as a misprision only, if the king please, as hath been shewn already in chapter twenty. 1 R. Treas. 25.
2 Rich. 3. 10.
S. P. C. 32.

Sec. 2. But generally misprision of felony is taken for a concealment of felony, (1) or a procuring of the concealment thereof, whether it be felony by the common law, or by statute. Summary 129.
S. P. C. 37. c.
3 Inst. 139.

(1) Silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision. 1 Hale 431, 448, 553. 2 Hale 75. 2 Ilawk. c. 12. For a man is said to discover the crime of another, to a magistrate, with all possible expedition. 3 Inst. 142. To disclose the concealment of treasure trove, is misprision of felony. 4 Comm. 121. 3 Inst. 133.

Sec. 3. For this offence every common person is punishable by fine and imprisonment at common law. And by the statute of Westm. 3 Edw. 1. c. 9. “If the sheriff, coroner, or any other bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent, or procure to conceal the felonies done in their libe ties; or otherwise will not attach nor arrest such felons, (there as they may) or otherwise will not do their office, for favour borne to such mis-doers, and be attainted thereof, they shall have one year’s imprisonment, and after make a grievous fine at the king’s pleasure, if they have wherewith; and if they have not wherewith, they shall have imprisonment of three years.” R. Treas. 22.
3 Inst. 173.

Sec. 4. By 3 Hen. 7. c. 1. “The justices of the peace of every shire of this realm, for the time being, may take by their discretion an inquest, whereof every man shall have lands and tenements to the yearly value of forty shillings, at the least, to enquire of the concealments of other inquests taken before them, and afore other, of such matters and offences, as are to be enquired and presented afore justices of the peace, whereof complaint shall be made by bill, or by bills, as well within franchise, as without. And if any such concealment be found of any inquest, so is afore rehearsed, had or made within the year after the same concealment, every person of the same inquest to be amerced for the concealment, by discretion of the same justices of the peace; the said amerancements to be suffered in plain sessions.”

Sec. 5.

3 Hale 619.
S. P. C. 47.
3 Inst. 134.
Summary 130.

Sec. 5. To this title of misprision of felony, that of theft-bote seems not improperly reducible, which is where one not only knows of a felony, but takes his goods again, or other amendſ not to prosecute.

F. Cor. 353.
2 Hale 400.
2 And. 47. C.
Eliz. 486. 536.
B. 2. c. 29. f.
26, &c.

Sec. 6. This offence is very nearly allied to felony, and is ſaid to have been anciently puniſhed as ſuch. But at this day it is puniſhable only with ranſom and imprifonment, unleſs it were accompanied with ſome degree of maintenance given to the felon, which makes the party an acceſſary after the fact.

B. Cor. 122. 42
Aſſ. Sum. 130.
3 R. Abr. 67.
F. Aſſ. 346.

Sec. 7. But the bare taking of one's own goods again, which have been ſtolen, is no offence at all, unleſs ſome favour be ſhewn to the thief. (2)

(2) To take any reward for helping any perſon to ſtolen goods, is made felony by 4 Geo. 1. c. 11. And to advertise a reward for the return of things ſtolen, incurs a forfeiture of fifty pounds, by 25 Geo. 2. c. 36. for which vide ante, appendix the eighth.

CHAPTER THE SIXTIETH.

OF SURETY OF THE PEACE.

INFERIOR offences more immediately againſt the ſubjeſt not capital, either amount to an actual diſturbance of the peace, or do not.

And fiſt I ſhall conſider ſuch offences of this kind, as amount to an actual diſturbance of the peace. But before I deſcend to the ſeveral kinds thereof, it may not be improper fiſt to ſhew what ſecurity may be had againſt the breach of the peace, before it happens.

And in order hereto, I ſhall examine how the breach may be ſecured. Fiſt, By ſurety for keeping the peace. Secondly, By ſurety for the good behaviour.

Dalt. c. 116.
4 Comm. 243.

As to ſurety for keeping the peace, I ſhall conſider the following particulars: Fiſt, In what caſes it ought to be taken *ex officio*. Secondly, At whoſe requeſt it ought to be granted. Thirdly, Againſt whom it ought to be granted. Fourthly, For what cauſe it is grantable. Fifthly, In what manner it is grantable by the courts of Chancery and King's Bench. Sixthly, In what manner it is grantable by a juſtice of peace. Seventhly, In what manner the proceſs for it ought to be executed. Eighthly, How ſuch proceſs may be ſuperſeded. Ninthly, What ought to be the form of a recognizance for this

this purpose. Tenthly, How such a recognizance may be discharged. Eleventhly, How such a recognizance ought to be certified and proceeded upon. Twelfthly, How it may be forfeited.

SECT. 1. As to the first point, *viz.* In what cases surety of the peace ought to be taken *ex officio*; it seems, that any justice of peace may, according to his discretion, bind all those to the peace, who in his presence shall make any affray, or shall threaten to kill or beat any person, or shall contend together with hot words, or shall go about with unusual weapons or attendants, to the terror of the people; and also all such persons as shall be known by him to be common barrators; and also all those who shall be brought before him by a constable for a breach of the peace in the presence of such constable; and all such persons who, having been before bound to keep the peace, shall be convicted of having forfeited their recognizance. (1)

Dalt. c. 67.
158.
Lamb. 77, 78.
9 Ed. 4s. 3.
B. Peace, 7, 8.
Cromp. 135.
142.
21 E. 4. 40.
Foster 135.

(1) Conservators of the peace also may grant surety according to their discretion. 4 Burr. 238. And this seems to have been the principal duty of a conservator. 11 St. Tr. 316. A secretary of state, therefore, nor a privy councillor, ever bind to the peace or the good behaviour, for they are not, as such, conservators of the peace. Lord Holt, indeed, in the case of Kendal and Roe, so considered them; but Lord Camden affirms that no treaty, case, record, or statute, has ever called them conservators of the peace from the beginning of time down to that decision. 11 St. Tr. 317.

SECT. 2. As to the second point, *viz.* At whose request the surety of the peace ought to be granted; it seems agreed at this day, that all persons whatsoever under the king's protection, being of sane memory, whether they be natural and good subjects, or aliens, or attainted of treason, &c. have a right to demand surety of the peace.

Dalt. c. 68.
Lamb. 78, 79.
Cromp. 133, 134.

SECT. 3. But it has been questioned, whether Jews or pagans, or persons attainted of *præmunire*, have a right to it or not.

Dalt. c. 68.
Lamb. 80.
4 Comm. 25.

SECT. 4. However it is certain, that a wife may demand it against her husband threatening to beat her outrageously, and that a husband also may have it against his wife. (2)

Register 89.
3 Keb. 643.
Id. Hard. cases,
74.
Stranger, 120.
F. N. B. 80.

Dalt. c. 68. Lamb. 78. Cromp. 133. 3 Lev. 128.

(2) And if the marriage is disputed, the court will order the recognizance to be worded so as not to admit the fact. Str. 1231.

SECT. 5. As to the third point, *viz.* Against whom the surety of the peace ought to be granted, there seems to be no doubt but that it ought, upon a just cause of complaint, to be granted by any justice of peace, against any person whatsoever,

Dalt. c. 68.
Lamb. 81, 82.
Cromp. 133.
3 Keb. 431.
2 Lev. 128.

under

See the books
above cited, and
Fitz. sub-
pena 20.

under the degree of nobility, being of sane memory, whether he be a magistrate or private person, and whether he be of full age, or under age, &c. But infants and females covert ought to find security by their friends, and not to be bound themselves; and the safest way of proceeding against a peer is by complaint to the court of chancery or king's bench. (2)

(2) It is said the fear of one cannot be the fear of another, and therefore every recognizance must be separate. Pult. 18. but in Mich. 23 Geo. 2. B. R. the court allowed three women to file joint articles of the peace against three men. The King v. Nettle, &c. MSS.

Dalt. c. 67.
Lamb. 82.
Crom. 135.
1 Lev. 109.
2 Lev. 228.
F. N. B. 801.
Reg. 88.
Moore. 874.
Godb. 215.
1 Keb. 290.

Scil. 6. As to the fourth point, *viz.* For what cause the surety of the peace is grantable; it seems clear, that, wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person; and that every justice of peace is bound to grant it, upon the party's giving him satisfaction upon oath, that he is actually under such fear; and that he has just cause to be so, by reason of the other's having threatened to beat him, or lain in wait for that purpose; and that he does not require it out of malice, or for vexation.

Dalt. c. 67.
Lamb. 82, 83.
Crom. 17 Ed. 4.
4.
B. Peace 22.
Crom. 134.

Scil. 7. It seems also the better opinion, that he who is threatened to be imprisoned by another, has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man: And the objection, that one wrongfully imprisoned may recover damages in an action, &c. and therefore needs not the surety of the peace, is as strong in the case of battery as imprisonment, and yet there is no doubt, but that one threatened to be beaten may demand the surety of the peace. (3)

(3) And although the fact from which the fear arises be pardoned, the court will receive it as a ground to grant the security upon. Str. 473.

See 1 Lev. 51
1 Sid. 67.
Skin. 61.
Mullineux &c.
Crom. 427.
Dalt. 234.

Scil. 8. As to the fifth point, *viz.* In what manner such surety is grantable by the courts of chancery and king's bench, it is enacted by 21 Jac. 1. c. 8. "That all process for the peace or good behaviour to be granted or awarded out of the same courts, or either of them, against any person or persons whatsoever, at the suit of, or by the prosecution of any person or persons whatsoever, shall be void and of none effect, unless such process shall be so granted or awarded, upon motion first made before the judge or judges of the same courts respectively, (sitting in open court, and upon declaration in writing upon their corporal oaths, to be then exhibited unto them, by the parties which shall desire such process) of the causes for which such process shall be granted or awarded, by or out of the said courts respectively, and unless that such motion and declaration be mentioned

"to be made upon the back of a writ; the said writings there
 "to be entered and remain of record; and that if it shall
 "afterwards appear unto the said courts, or either of them
 "respectively, that the causes expressed in such writings, or
 "any of them, be untrue, That then the judge or judges of
 "the said courts, or either of them respectively, shall and
 "may award such costs and damages unto the parties grieved,
 "for their, or any of their wrongful vexations in that behalf,
 "as they shall think fit; and that the party or parties of of-
 "fending, shall and may be committed to prison by such
 "judge or judges, until he or they pay the said costs and
 "damages. (4)

(4) A peer or peers may not be bound over in any other place than the courts of king's bench or chancery. 4 Comm. 251. A peer may demand it against her lord, as in the case of the Marquis of Carmarthen. Foster 359. Lord Vane, Str. 1202. Earl of Stamford. Hardw. cases 74. Earl Ferrers. Burr. 631, 703. Lady Strathmore, East. 25 Geo. 3. Lord Howard, 11 Mod. 109. Also 3 Burr. 1922. The articles must be verified by the oath of the exhibitant; an affirmation therefore is not sufficient. Str. 527. 12 Mod. 243. Nor will the court permit the truth of the allegations to be controverted by the defendant, but will order security to be taken immediately, if no objections arise upon the face of the articles themselves. Str. 1202. But if on an application for the assistance of the court to enforce the subsequent process, the articles should manifestly appear, from the corroborated affidavit of the defendant, to have been malicious, voluntary, and gross perjury, the court will resist the application, and commit the offender. 2 Burr. 806. 3 Burr. 1922. Nor will the court receive articles of the peace, if the parties live at a distance in the country, unless they have previously made application to a justice in the neighbourhood. 2 Burr. 780. And if the court do receive them, the security may indorse the attachment, in the sum required, and order a justice of the country to take the security. 2 Burr. 1030. 1 Black. 223. Or, in very particular circumstances attend the case, the court will compel the justices by mandamus. Strange 835. But that this is a singular instance, vide Sayer 253.

Sec. 9. As to the sixth point, viz. In what manner such surety is grantable by a justice of peace, it seemeth certain, That if the person to be bound be in the presence of the justice, he may be immediately committed, unless he offer sureties; and from hence it follows, *a fortiori*, that he may be commanded by word of mouth to find sureties, and committed for his disobedience; but it is said, that if he be absent, he cannot be committed without a warrant from some justice of peace, in order to find sureties, and that such warrant ought to be under seal, and to shew the cause for which it is granted, and at whose suit, and that it may be directed to any indifferent person. (5)

14 H. 7, 8, 9.
 10.
 9 Ed. 4, 5.
 B. Mai. pr. 39.
 Lamb. 82, &c.
 Dalr. c. 69.
 2 Will. 158.

(5) A justice cannot enjoin another to keep the peace under a penalty. 3 Com. Dig. 1-0. Nor commit for not finding security, until the party has been required, and has refused to do so. For Pratt. King v. Wilks, E. 3 Geo. 3.

Sec. 10. As to the seventh point, viz. In what manner the process for the peace ought to be executed. It seems needless to give a particular account of the execution of the writ of *supplicavit*, because I do not find that it is much in use at this day, and therefore I shall refer the reader for this purpose to *Fitzherbert's Natura Brevium*, fol. 80, &c. But as to the execution of a warrant of a justice, the following rules are to be observed. (6)

Reg. 88.
 1 Keb. 25, 290.
 6 Mod. 43.
 2 Peere Will.
 222.
 Skinner 61.
 2 Keb. 35.
 1 Sid. 67.
 1 Lev. 53.

(6) If there be no proceedings on a *supplicavit* within a year, the recognizance is, of course, discharged; and if the party be committed after the expiration of that time, he shall be discharged upon

very slight security. *Fitzg. 268.* If taken below, and the party appear pursuant to the condition, no commitment being lodged, he must be discharged. *Hard. Ca.* But the court in discretion may refuse to discharge a recognizance, even though the exhibitant appear and consent; for a breach against any other person is equally a forfeiture. *11 Mod. 109.*

Lamb. 89.

Sett. 11. First, It can be executed only by the persons to whom it is directed, or some of them, unless it be directed to the sheriff, who may either by parole, or by precept in writing, authorize an officer sworn and known, to serve it, but cannot empower any other person without a precept in writing.

L. Quinto.
5 Ed. 4. 12, 13.
B. false imp. 13.
Dalt. c. 69.
Lamb. 90, 91.
Crom. 235.
5 Co. 59.
6 Co. 54.
5 Co. 59.

Sett. 12. Secondly, If the warrant be made in the common form, directing the officer to cause the party complained of to come before some justice of the peace to find sufficient surety, &c. and if he shall refuse so to do, to convey him immediately to prison, without expecting any further warrant, until he shall willingly do the same, &c. the officer who serves it, before he makes any arrest, ought first to require the party to go with him, and find sureties according to the purport of the warrant, but upon his refusal to do either, he may carry him to the gaol by force of the same warrant without more.

Dalt. c. 69.
Brook false imprisonment 11.
21 H. 7. 21.
Lamb. 94, 95.

Sett. 13. Thirdly, If the warrant specially direct, that the party shall be brought before the justice who made it, the officer ought not to carry him before any other. But if the warrant be general, to bring him before any justice of peace, &c. the officer has the election to bring him before what justice he pleases, and may carry him to prison for refusing to find surety before such justice.

Dalt. c. 69.

Sett. 14. As to the eighth point, *viz.* How such process may be superseded. It is said, That if one who fears that the surety of the peace will be demanded against him, find sureties before any justice of the peace of the same county, either before or after a warrant is issued against him, he may have a *superfedeas*, from such justice, which shall discharge him from arrest from any other justice, at the suit of the same party, for whose security he has given such surety. Also it is said, That an appearance upon a recognizance for the peace may be superseded, by finding sureties in the chancery or king's bench, and purchasing a writ testifying the same. But this practice having often been abused by turbulent persons, who deservedly fearing to be bound to the peace or good behaviour, by justices of peace, would procure themselves to be bound thereto in the said courts, upon insufficient sureties, or upon the colourable prosecution of some person who would be ready at all times to release them at their pleasure; whereupon writs of *superfedeas* had been often directed to justices of peace, commanding them to forbear to arrest the parties for such causes; by reason whereof such turbulent persons used to misdemean themselves among their neighbours with impunity, as it is recited by *21 Jac. 1. c. 8.* It is thereupon enacted by the

Lamb. 112, 113.
See 2 R. Abr.
492.

the said statute, "That all writs of superſedeas, to be granted, out of either of the ſaid courts, ſhall be void, unleſs ſuch proceſs be granted upon motion in open court firſt made, &c. upon ſuch ſufficient ſureties, as ſhall appear unto the judge or judges of the ſame court reſpectively, upon oath, to be aſſeſſed at five pounds lands, or ten pounds in goods, in the ſubſidy book, at the leaſt; which oaths, and the names of ſuch ſureties, with the places of their abode, and where they ſtand ſo aſſeſſed in the ſubſidy books, ſhall be entered, and remain of record in the ſame courts: And unleſs it ſhall alſo firſt appear unto the ſaid judge or judges, from whom ſuch ſuperſedeas is deſired, That the proceſs of the peace, or good behaviour, is proſecuted againſt him or them, deſiring ſuch ſuperſedeas *bona fide*, by ſome party grieved, in that court, out of which ſuch ſuperſedeas is deſired to be ſo awarded and directed,"

2 Chanc. Rep. 66.

Vide ante, c. 88
2 Burr. 305.

SECT. 15. As to the ninth point, viz. What ought to be the form of ſuch a recognizance. If it be taken in purſuance of a writ of *ſuppliavit*, it muſt be wholly governed by the directions of ſuch writ; but if it be taken before a juſtice of peace, upon a complaint below; it ſeems that it may be regulated by the diſcretion of ſuch juſtice, both as to the number and ſufficiency of the ſureties, and the largeneſs of the ſum; and the continuance of the time, for which the party ſhall be bound. And it hath been ſaid, That a recognizance to keep the peace as to A. B. for a year, or for life, or without expreſſing any certain time, (in which caſe it ſhall be intended to be for life) or without fixing any time or place for the party's appearance, or with out binding him to keep the peace againſt all the king's people in general, is good.

1 Com. 103, 104;
Dalt. c. 70.

SECT. 16. However, it ſeems to be the ſafeſt way to bind the party to appear at the next ſeſſions of the peace, and in the mean time to keep the peace as to the king, and all his liege people, eſpecially as to the party, according to the common form of precedents.

3 Com. Dig. 372
Lamb. 125.
Dalt. c. 124.

SECT. 17. As to the tenth point, viz. How ſuch a recognizance may be diſcharged. It ſeems agreed, That it may be diſcharged by the demise of the (a) king in whole reign it was taken, or of the (b) principal party who was bound thereby, if it were not forfeited before. Alſo it hath been holden, That it may be diſcharged by the (c) releaſe of the party at whole complaint it was taken; being certified together with it. But this may juſtly be queſtioned; becauſe the recognizance is not to the ſubject, but to the king, and confequently cannot be diſcharged by the ſubject, who is not a party to it. However, ſuch a releaſe will be a good inducement to the court, to which ſuch a recognizance ſhall be certified, to diſcharge it; and ſo alſo will the non-appearance of the party at

(a) B. P. 1. 15.
1 H. 7. 2. 11.
(b) 15 H. 7. 2;
15.
21 Ed. 4. 70.
Dalt. c. 71.
1 L. v. 2. 5.
(c) Lamb. 117.
80.
C. m. 139, 163;
143.
1 H. 7. 12.
11 H. 4. 43.
B. 2. c. 39;
1. 64. c. 37;
1. 37.
2 Vent. 131

Savil 53.
1 Lev. 235.
C. Jac. 132.
Yelv. 207.
12 Mod. 251.
Str. 835.
2 P. Will. 202.
1 Burr. 704.
3 Burr. 1922.

whose complaint it was taken, in order to pray the continuance of it; and yet it is said, that the sessions in that case may, in their discretion, refuse to discharge it. However, it is certain that such a recognizance cannot be pardoned, or released by the king, before it is broken, because the subject has a kind of interest in it. And it is said, That the sureties are not discharged by their death, but that their executors, &c. continue bound as their testators, &c. were:

Lamb. 111, 112,
4 &c.
Dalt. c. 70.
Hib. 1 Geo. 1.
K. v. Combs a-
greed.

Sett. 18. As to the eleventh point, viz. How such a recognizance ought to be certified, and proceeded upon. If it be taken by force of a writ of *supplicavit*, it needs not be certified till the justice receive a writ of *certiorari* to that purpose; but if it be taken upon a complaint below, it must be certified; sent, or brought to the next sessions of the peace by force of 3 Hen. 7. c. 1. that the party so bound may be called; and by the same statute, "If the party then make default, the same default shall be then recorded, and the same recognizance with the record of the default, shall be certified into the chancery, king's bench, or exchequer." However, if the party have any excuse for his not appearing, it seems that the sessions is not bound peremptorily to record his default, but may equitably consider of the reasonableness of such excuse. And it is said, That the sessions cannot in any case proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or breaking the peace; but that the recognizance in such case ought to be removed into some of the king's courts of Westminster-hall, who shall proceed by *scire facias*, upon such recognizance, and not by indictment, &c.

Sayer 257.
Dalt. c. 71.
Rym. 169, 196.
C. Jac. 598.
1 R. A. 900.
Parker 54.

Sett. 19. It seemeth that in a *scire facias* upon such a recognizance, it is sufficient to lay the fact alledged for the breach thereof, as having been done *contra pacem*, without using the words *vi & armis*.

2 Bull. 120.
Whether the
fact must
show the lay on
which the
sessions was holden,
till which the party was bound to keep the peace. C. Car. 138.

Sett. 20. As to the twelfth point, viz. How such recognizance may be forfeited. There is no doubt but that it may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others thro' his procurement, as manslaughter, rape, robbery, unlawful imprisonment, &c.

W. Peace 20.
Dalt. c. 72.
Lamb. 127, 128.
Sayer 159.

Sett. 21. Also it has been holden, That it may be forfeited by any treason against the person of the king, and also by any unlawful assembly *in terrorem populi*, and even by words directly tending to a breach of the peace, as by challenging one to fight, or in his presence, threatening to beat him; &c.

Lamb. 115, &c.
Dalt. c. 72.
2 H. 7. c. 1.
other 119.
18 Ed. 4. c. 28.
22 Ed. 4. c. 4.
C. Car. 49.
1999. See
8. 5:7

books cited in the following section, and 2 R. Abr. 545. Pl. 2, 3, 4, 5, 6, 7,

Self. 22. However, it seems that it shall not be forfeited by bare words of heat and choler, as the calling a man knave, teller of lies, rascal, or drunkard; for though such words may provoke a cholerick man to break the peace, yet they do not directly challenge him to it, nor does it appear that the speaker designed to carry his resentment any farther. And it has been said, That even a recognizance for the good behaviour, shall not be forfeited for such words; from whence it follows *a fortiori*, That a recognizance for the peace shall not.

Sayer 140.

C. Eliz. 86.
Moor 149.
2 Roll. 199, 229.
Palmer 126.
Infra p. 262.

Self. 23. Also there are some actual assaults on the person of another, which do not amount to a forfeiture of such a recognizance; as if an (a) officer, having a warrant against one who will not suffer himself to be arrested, beat or wound him in the attempt to take him; or if a (b) parent in a reasonable manner chastise his child, or a master his servant, (c) being actually in his service at the time; or a (d) schoolmaster his scholar, or a (e) gaoler his prisoner, or even a (f) husband his wife, as some say; or if (g) one confine a friend who is mad, and bind, and beat him, &c. in such a manner as is proper in such circumstances; or if a man (h) force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inserting a dog against a third person; or if (i) I beat one (without (k) wounding him, or throwing at him a dangerous weapon) who wrongfully endeavours with violence to dispossess me of my land, or goods; or the goods of another delivered to me to be kept for him, and will not desist upon my laying my hands gently on him, and disturbing him; or if a man beat, (l) or, as some say, wound, or maim one who makes an assault upon his person, or that of his (m) wife, parent, child, or master; especially if it appear that he did all he could to avoid fighting before he gave the wound; or if a (n) man fight with or beat one who attempts to kill any stranger; or if a man even (o) threaten to kill one who puts him in fear of death in such a place where he cannot safely fly from him; or if one (p) imprison those whom he sees fighting, till the heat is over.

(a) 2 B. 4. 6.
21 H. 7. 39.
(b) Dalt. c. 72.
Groom. 136.
(c) 38 H. 6. 25.
1 Sid. 178.
(d) Sum. 31.
1 Sid. 177.
21 Ed. 4. 6.
(e) Dalt. c. 74.
(f) Crom. 28.
176.
F. N. B. 80.
Henty 149.
Con. 1 Sid. 138.
178.
(g) 21 Aft. 56.
2 R. A. 347.
21 Ed. 4. 3.
(h) G. Jac. 134.
2 R. A. 548.
(i) 3 H. 4. 6.
Lutw. 148.
C. Jac. 236.
C. Car. 138.
19 H. 6. 31.
10 E. 4. 6.
11 Ed. 4. 28.
Keltw. 92.
Yelv. 172.
2 R. A. 547.
543, 549.
Fole. 5. 6.
Crom. 137.
Dalt. c. 72.
Inf. c. 64. f. 10.

(k) 2 R. Abr. 548. (l) 41 Aff. 21. 27 Ed. 3. 94. 25 Ed. 3. 42. 8 H. 4. 8. 9 Ed. 4. 48.
12 Ed. 4. 6. B. Tort Dem. 57. 1 Sid. 246. Keltw. 128. 2 R. Abr. 547. 1 Keb. 884, 921.
2 Inst. 316. (m) 35 H. 6. 50, 51. 19 H. 6. 31, 66. 12 Ed. 4. 6. Crom. 136. Dalt. c. 72.
2 R. Abr. 546. (n) 12 H. 8. 2. (o) 32 H. 6. 18. 10 Ed. 4. 6. (p) 2 R. Abr. 359.
22 E. 4. 45.

Self. 24. According to some opinions, a (q) master shall not forfeit such a recognizance for beating another in defence of his servant. But it is said, That a (r) servant is liable to such forfeiture for beating another in defence of his master's

(q) 2 R. Abr. 546.
19 H. 6. 32, 66.
Dalt. c. 72.
Crom. 134.
Cona 9 Ed. 4.

43. Salt. 407. (r) 9 Ed. 4. 42. B. Pres. 179.

son, though he were commanded by the master so to do, because he is not a servant to the son; and for the like reason it is said, That a (a) tenant shall incur the like forfeiture for beating another in defence of his landlord, &c.

(a) Dalr. c. 72.
Limb. 129.

Crom. 136.
Dalr. c. 72.
C. Eliz. 86.
Moor. 249.

Sec. 25. But it seems agreed, That no one shall forfeit such a recognizance by a bare trespass on another's lands, or goods, unless it be accompanied with some violence to the person.

Dalr. c. 22.
B. Co. 229.
F. Bar. 244.

Sec. 26. And it seems to be the better opinion, That a man is in no danger of such a forfeiture from any hurt done to another, by playing at cudgels, or such like sport, by consent, because the intent of the parties seems no way unlawful, but rather commendable, and tending mutually to promote activity and courage. Yet it is said, That he who wounds another in fighting with naked swords, does in strictness forfeit such a recognizance, because no consent can make so dangerous a diversion lawful.

Hobart 174.
2 R. Abi. 346.

Sec. 27. But it seemeth, That a man shall not forfeit such recognizance, by a hurt done to another merely through negligence, or mischance; as where one soldier hurts another by discharging a gun in exercise, without sufficient caution; for notwithstanding such person must, in a civil action, give the other satisfaction for the damage occasioned by his want of care, yet he seems not to have offended against the purpose of such a recognizance, unless he be guilty of some willful breach of the peace.

CHAPTER THE SIXTY-FIRST.

OF SURETY FOR THE GOOD BEHAVIOUR.

4 Comm. 243,
251, 253.

AND now we are come to surety for the good behaviour, which being of great affinity with surety of the peace, both as to the manner in which it is to be taken, superadded, and discharged, &c. seems not to require a particular consideration, save only as to the following points, First, For what misbehaviours it is to be required.—Secondly, For what it shall be forfeited.

Sec. 1. As to the first point, it is to be observed, That by 34 Edw. 3. c. 1. "Justices of peace are empowered
"to restrain offenders, rioters, and all other barrators, and
"to pursue, arrest, take, and chastise them, according to
"their trespasss, or offence; and to cause them to be
"imprisoned, and duly punished according to the laws and
"customs

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“customs of the realm, and according to that which to them
“shall seem best to do by their discretions, and good advice-
“ment, and also to inform them, and to enquire of all those
“who have been pillors and robbers in the parts beyond
“the sea, and be now come again, and go wandering, and
“will not labour as they were wont in times past, and to take
“and arrest all those that they may find by indictment or by
“suspicion, and to put them in prison, and to take of all them
“that be not of good fame, where they shall be found,
“sufficient surety and mainprize of their good behaviour
“towards the king, and his people, and the other duly to pu-
“nish, to the intent that the people be not by such rioters
“troubled nor indamaged, nor the peace blemished, nor mer-
“chants, nor others passing by the highways of the realm dis-
“turbed, nor put in the peril which may happen of such of-
“fenders.”

Vide *Carlow* 524.

Sec. 2. In the construction hereof there seem to have been
some opinions, that the statute, speaking of those that be not of
good fame, means only such as are defamed, and justly sus-
pected that they intend to break the peace, and that it does
not any way extend to those who are guilty of other misbeha-
viours not relating to the peace. But this seems much too
narrow a construction, since the abovementioned expression of
persons of evil fame, in common understanding, as properly
includes persons of scandalous behaviour in other respects, as
those who by their quarrelsome behaviour give just suspicion of
their readiness to break the peace. And, accordingly, it seems
to have been always the better opinion, That a man may be
bound to his good behaviour for many causes of scandal which
give him a bad name, as being contrary to good manners only;
as for (a) haunting bawdy-houses with women of bad fame;
or for (b) keeping bad women in his own house; or for speak-
ing words of contempt of an inferior (c) magistrate, as a jus-
tice of peace, or mayor of a town, &c. though he be not
then in the actual execution of his office, or of an inferior
officer of justice, as a constable, and such like, being in the
actual execution of his office.

4 *Inq.* 187.
2 *Il.* 7. 2. 5.
13 *Il.* 7. 10.
Pulton 13.

4 *Burn* 270.
Lamb. 115, 116.
117.
12 *alt. c.* 75.

12 *Mod.* 566.
(2) 13 *H.* 7. 10.
(1) *Crom.* 140.
(1) *C.* 140. 18.
1 *Levin.* 52.
53. 17.
11 *Co.* 68.
1 *R.* 11. 174.
1 *Levin* 210.
C. n. C. Eliz.
629, 449.
Palmer 126.

1 *R.* 11, 227, 228. 3 *Bull.* 139, 140. *Cru. Cur.* 409.

Sec. 3. However, it seems the better opinion, That
no one ought to be bound (d) to the good behaviour for any
rash, quarrelsome, or unmannerly words, unless they either
directly tend to a breach of the peace, or to scandalize the go-
vernment, by abusing those who are intrusted by it with the
administration of justice, or to deter an officer from doing his
duty; and therefore it seems, That he (e) who barely calls
another rogue, or rascal, or teller of lies, drunkard, &c.
ought not for such cause to be bound to the good behaviour.

(d) *C.* Car. 498.
599.
7. 2. *Fliv.* 86.
11 *r.* 229.
5. *c.* 60. 122.
2 *R.* 11. 299.
227.
Palmer 126.

Sec. 4. However, I cannot find any certain precise rules for the direction of the magistrate in this respect, and therefore am inclined to think, that he has a discretionary power to take such surety of all those whom he shall have just cause to suspect to be dangerous, quarrelsome, or scandalous, as of those who sleep in the day, and go abroad in the night, and of such as keep suspicious company, and of such as are generally suspected to be robbers, &c. and of eve-droppers, and common drunkards, and all other persons, whose misbehaviour may reasonably be intended to bring them within the meaning of the statute, as persons of evil fame, who, being described by an expression of so great latitude, seem in a great measure to be left to the judgment of the magistrate. But if he commit one for want of sureties, he must shew the cause, &c. with convenient certainty. (1)

Dalt. 75.
1 Roll. 150.
1 Ven. 22, 23,
24.

(1) Security for good behaviour may be taken. For using opprobrious terms in a court of justice, 1 Lev. 157. Accusing justices of ignorance in the Excise laws, 1 Vent. 16. Publishing an obscene book. Post, 103. For exciting discontents in the minds of the people. 2 Vent. 24. For offering medicines to destroy a child in the womb. Cro. Eliz. 449. For obstructing another on his necessary way to a court of justice, 2 Lill. R. 649. For disturbing a licensed preacher. 1 Mr. s. 2. 3. For unlawful fishing or hunting. 5 Lill. c. 31. For neglecting church a month. 23 Eliz. c. 1. For hunting or stealing deer or conies. 1 Jac. 1. c. 13. sed vide 16 Geo. 3. c. 26. And it is a usual part of the judgment in a misdemeanor. 4 Bac. Ab. 698. But a justice of the peace cannot compel the security upon a general information. Str. 16. And whether a person taken upon the warrant of a secretary of state for a libel, shall give security for his good behaviour, seems unsettled, 1 Will. 20. sed vide 2 Will. 16c. And for a very full account of this title, 4 Burn 269, 283.

Palm. 129, 130.
C. Car. 499.

Sec. 5. As to the second point, viz. For what misbehaviours such a recognizance shall be forfeited, it is laid down as a general rule in the argument of *Stamp and Hide's case*, That whatever will be a good cause to bind a man to his good behaviour, will forfeit a recognizance for it. Yet this is since denied in *Heyward's case*; and indeed does by no means seem to be maintainable, because the statute in ordering persons of evil fame to be bound in this manner, seems in many cases chiefly to regard the prevention of that mischief which they may justly be suspected to be likely to do; and in that respect requires them to secure the publick from that danger which may probably be apprehended from their future behaviour, whether any actual crime can be proved upon them, or not; and it would be extremely hard in such cases to make persons forfeit their recognizance, who yet may justly be compellable to give one, as those who keep suspicious company, or those who spend much money idly, without having any visible means of getting it honestly, or those who lie under a general suspicion of being rogues, &c.

13 H. 7. 10.
Dalt. c. 75.

13 H. 7. 2.
C. Eliz. 86.
Moun 249.
2 Roll 228, 130,
199.
C. Car. 499.

Sec. 6. However, it seems that such a recognizance shall not only be forfeited for such actual breaches of the peace, for which a recognizance for the peace may be forfeited, but also for some others, for which such a recognizance cannot be forfeited; as for going armed with great numbers to the ter-

ror of the people, or speaking words tending to sedition, &c. add also for all such actual misbehaviours which are intended to be prevented by such a recognizance, but not for barely giving cause of suspicion of what perhaps may never actually happen.

It may be discharged on motion on producing prosecutor's consent, verified by affidavit. Hardwick's cases, 158. Or consenting by counsel. 2 Burr. 703. See vide ch. 69. §. 17.

CHAPTER THE SIXTY-SECOND.

OF ASSAULTS AND BATTERIES.

AND now I am come to consider the several kinds of actual disturbances of the peace, and these are; either, Such as may be committed by one or two persons: or, Such as require a great number.

Those which may be committed by one or two persons, are, Assaults and batteries; or, Affrays; or, forcible entries and detainers.

As to assaults and batteries, I shall consider the following particulars; First, What shall be said to be an assault. Secondly, What shall be said to be a battery. Thirdly, In what cases they may be justified. Fourthly, In what manner they are to be punished.

Sec. 1. As to the first point. It seems that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another; as by striking at him with, or without, a weapon; or presenting a gun at him, at such a distance to which the gun will carry, or pointing a pitch-fork at him, standing within the reach of it; or by holding up one's fist at him, or by any other such like act done in an angry threatening manner; and from hence it clearly follows, That one charged with an assault and battery, may be found guilty of the former, and yet acquitted of the latter. But every battery includes an assault, therefore on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. Notwithstanding the many ancient opinions to the contrary, it seems agreed at this day, that no words whatsoever can amount to an assault.

Sec. 2. As to the second point, viz. What shall be said to be a battery. It seems that any injury whatsoever, be it never so small, being actually done to the person of a man, in an angry, or revengeful, or rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violent-

Pulton 4.
6 Mod. 173, 174.
2 R. Abr. 545.
1 Vent. 256.
1 Mod. 3.
1 Keb. 921.
41 Ed. 3. 40.
42 Ed. 3. 7.
45 Ed. 1. 24, 25.
23 Aff. 60.
2 R. Abr. 545.
10 Mod. 187.
2 Keb. 545.
Law of Evid.
315.

22 AT. 17.
Pult. 3.
Lamb. 126.
Salk. 384.
6 Mod. 149.
172.
1 Mod. 3.

3 Lev. 401.
8 Km. 237.
2 R. Abr. 346.

ly jostling him out of the way, are batteries in the eye of the law. But it is said to be no battery to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants,

6 Mod. 172.
230, 263.
4 Comm. 145.
216.
11 Mod. 43, 52.
2 Salk. 642.
L. Ray. 177.
1 Sid. 216.
Holt. 659.

Sec7. 3. As to the third point, viz. In what cases an assault and battery may be justified. This is so fully set forth already in the chapter of *Safety of the Peace*, that there seems to be no need of any farther consideration thereof in this place; and therefore I shall only add, That where a man in his own defence beats another who first assaults him, &c. he may take an advantage thereof upon an indictment, as well as upon an action; but with this difference, that in the first case he may give it in evidence upon the plea of Not guilty, and in the latter he must plead it specially.

2 M.
1 Ea. 156.

Sec7. 4. As to the fourth point, viz. How unlawful assaults and batteries are punished, there is no doubt but that the wrong doer is subject, both to an action at the suit of the party, wherein he shall render damages, &c. and also to an indictment, or the suit of the king, wherein he shall be fined according to the heinousness of the offence.

Form of
plea, Cr. Cir.
121.

† Sec7. 5. By 5 Hen. 4. c. 6. and 11 Hen. 6. c. 11.
“To assault or affray any of the members of the house of
“lords, or house of commons, or other council of the king,
“or any of their servants, in their way to, or attendance on
“parliament, is punishable, upon non-forclosure, or
“mation, with double damages, and fine and ransom at dis-
“cretion.”

4 Comm. 218.
6 Mod. 172.
2 Inst. 494, 620.

† Sec7. 6. By 9 Edw. 2. c. 3. “If any lay violent hands
“on a clerk, he may be indicted before the king for the peace
“broken; and sued before the bishop for the spiritual of-
“fence.”

† Sec7. 7. By 5 Eliz. c. 4. s. 21. “If any servant assault or
“affray his master, mistress, or overseer, he shall suffer im-
“prisonment, not exceeding a year, on conviction before two
“justices of the county, or the chief magistrate and two cor-
“porators of a town.—And if further punishment should ap-
“pear necessary, the justices in sessions, or the head magistrate
“and four or six corporators in a town, may exercise their
“discretion, so that the punishment extend not to life or
“limb.”

Cr. Cir. 121.

† Sec7. 8. By 9 Ann. c. 16. “To assault and strike any
“privy counsellor, in the council, or in any committee
“thereof, in the execution of his duty, is death.”

† Sec7. 9. By 9 Ann. c. 14. s. 8. “To assault and beat
“any other on account of money won by gaming, in the man-

“ner described, is forfeiture of goods, and two years imprisonment.”

† *Stat.* 10. By 6 Geo. 1. c. 23. s. 11. “To assault another in the street, with intent to spoil their cloaths, is transportation.” Vide O. B. 1781, No. 261. Cio. Cir. 122.

† *Stat.* 11. By 9 Geo. 1. c. 22. “To assault another by wilfully shooting at him, is felony without clergy.” Ante. p. 125.

† *Stat.* 12. By 7 Geo. 2. c. 21. “To assault with intent to rob is transportation.” Ante. p. 148.

† *Stat.* 13. By 12 Geo. 1. c. 24. “To assault any master woolcomber, or weaver, or other person concerned in the woollen manufactory, whereby he shall receive any bodily hurt, for not complying with any of the bye laws which are mentioned in the act, or shall write or send any threatening letter, &c. &c. is transportation for seven years.” Ante. p. 239.

CHAPTER THE SIXTY-THIRD.

OF AFFRAYS.

IN treating of Affrays, I shall consider,—First, What shall be said to be an affray. Secondly, How far it may be suppressed by a private person. Thirdly, How far by a constable. Fourthly, How far by a justice of peace. Fifthly, In what manner the several kinds of affrays may be punished. 4 Comm. 145.

Sec. 1. As to the first point, It is said, That the word affray is derived from the *French* word *Effrayer*, to terrify, and that in a legal sense it is taken for a publick offence, to the terror of the people. From this definition it seems clearly to follow, That there may be an assault which will not amount to an affray; as where it happens in a private place, out of the hearing or seeing of any, except the parties concerned; in which case it cannot be said to be to the terror of the people; and for this cause such a private assault seems not to be inquirable in a court of law, as all affrays certainly are, as being common nuisances. 3 Inst. 158. Dalt. c. 8. Lamb. 125, 126. 4 H. 6. 12. 5 Ed. 4. 5. Summary 135.

Sec. 2. Also it is said, that no quarrelsome or threatening words whatsoever shall amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows; yet it seemeth, That the constable may, at the request of the party threatened, 23 Ed. 4. 45. Dalt. c. 8. Lamb. Con. stable, 14.

ened, carry the person, who threatens to beat him, before a justice, in order to find sureties.

Popham 158.
3 Inst. 148.
1 Sid. 186.
1 Keb. 694.
Hob. 120, 215.
2 R. Abr. 78.
3 Burr. 316
Carr & Hanky.

Sec. 3. Also it is certain, That it is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c.

† By 9 Ann c. 14. s. 8. "Whoever shall challenge or provoke to fight any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in the act, shall, on conviction by indictment, or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment without bail, in the county prison for two years."

Lamb. 126.
3 Inst. 160, 6.
2 R. Abr. 78.
Summary 137.

Sec. 4. But granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray; yet it seems certain, That in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by many statutes.

For by 2 Edw. 3. it is enacted, "That no man, great nor small, of what condition soever he be, except the king's servants, in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, and the same in such places where such acts happen, be so hardy to come before the king's justices, or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the king, and their bodies to prison, at the king's pleasure. And that the king's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables and wardens of the peace within their wards, shall have power to execute this act: And that the justices assigned, at their coming down into the country, shall have power to enquire how such officers and lords have exercised their offices in this case, and to punish them whom they find, that have not done that which pertained to their office," and this statute is farther enforced by 7 Rich. 2. c. 13. and 20 Rich. 2. c. 1.

Sec.

Sett. 5. And in the exposition of it the following points have been holden : First, That any justice of peace, or other person, who is empowered to execute this statute, may proceed thereon, either *ex officio*, or by force of a writ out of chancery, formed upon the statute, and that if he find any person in arms contrary to the form of the statute, he may seize the arms, and commit the offender to prison ; and that he ought also to make a record of his whole proceeding, and certify the same into the chancery, where he proceeds by force of the said writ, or into the exchequer, where he proceeds *ex officio*.

F. N. B. 249.

1 Inst. 162.
Dalt. c. 22.
Lamb. 168. &c.
Dalt. 23.
2 Bull. 330.

Sett. 6. Secondly, That where a justice of peace, &c. proceeds upon the said writ, he may not only imprison those whom he shall find offending against the statute in his own view, but also those who shall be found by an inquest taken before him, to have offended in such manner in his absence. And I do not see why he may not do the same where he proceeds *ex officio* ; for seeing the said writ hath no other foundation but the said statute, and is the most authentick explication thereof, it seemeth that the rules therein prescribed, should be the best direction for all proceedings upon that statute.

C. Eliz. 294.
Con. Lamb. 170.

Sett. 7. Thirdly, That the under-sheriff may execute the said writ, being directed to the sheriff, if it name him only by the name of his office, and not by his proper name, and do not expressly command him to act in his proper person.

C. Eliz. 294.

Sett. 8. Fourthly, That a man cannot excuse the wearing such armour in publick, by alledging that such a one threatened him, and that he wears it for the safety of his person from his assault ; but it hath been resolved, That no one shall incur the penalty of the said statute for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle.

24 Ed. 3. 35.
21 H. 7. 39.
3 Inst. 161.
Con. 2 Roll. 78.
2 H. 7. 39.

Sett. 9. Fifthly, That no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people ; from whence it seems clearly to follow, That persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. And from the same ground it also follows, That persons armed with privy coats of mail, to the intent to defend themselves, against their adversaries, are not within the meaning of this statute, because they do nothing *in terrarem populi*.

3 Mod. 117.
2 Bull. 330.

Crem. 64.

Sett. 10. Sixthly, That no person is within the intention of the said statute, who arms himself to suppress dangerous rioters,

Pop. 121, 122.

rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace or quiet of the realm; for persons who so arm themselves, seem to be exempted out of the general words of the said statute, by that part of the exception in the beginning thereof, which seems to allow all persons to arm themselves upon a cry made for arms to keep the peace, in such places where such acts happen.

SECT. 11. As to the second point, *viz.* How far an affray may be suppressed by a private person, it seems agreed, That any one who sees others fighting, may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace: Also it is said, That any private person may stop those whom he shall see coming to join either party; and from hence it seems clearly to follow, That if a man receive a hurt from either party in thus endeavouring to preserve the peace, he shall have his remedy by an action against him; also upon the same ground it seems equally reasonable, That if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it, inasmuch as he is no way in fault; and the damage done to the other, was occasioned by a laudable intention to do him a kindness.

SECT. 12. However it seems clear, That if either party be dangerously wounded in such an affray, and a stander by, endeavouring to arrest the other, be not able to take him without hurting, or even wounding him, yet he is no way liable to be punished for the same, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace, by whom he either is to be bailed or committed, &c.

SECT. 13. As to the third point, *viz.* How far an affray may be suppressed by a constable. It seems agreed, That a constable is not only impowered, as all private persons are, to part an affray which happens in his presence, but is also bound at his peril to use his best endeavours to this purpose, and not only to do his utmost himself, but also to demand the assistance of others, which if they refuse to give him, they are punishable with fine and imprisonment.

SECT. 14. And it is said, That if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, &c. or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c. or

Lamb. 131.
3 Inst. 158.
Summary 131.
2 Inst. 52.
22 E. 4. 44.
Dalt. c. 8.
Lamb. 131.
Just. 17.

3 Inst. 158.
C. Lamb. 131.
Dalt. c. 8.

Lamb. 131.
Dalt. c. 8.
3 Inst. 158.
B. 1. 1 p. 35.
44.
Summary 135.
11 H. 7. 27.
2 Inst. 52.

3 Inst. 158.
Summary 135.
Lamb. 131.
Dalt. c. 8.
3 H. 7. 10.

Lamb. 131, 133.
Dalt. c. 8.
Summary 136.
Dalt. c. 8.
B. Society 23.
26.
C. Eliz. 37.
9 Ed. 4. 20.

he may imprison him of his own authority for a reasonable time; till the heat shall be over, and also afterwards detain him till he find such surety by obligation. But it seems, That he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence, And it is said, That he ought not to lay hands on those, who barely contend with hot words, without any threats of personal hurt, and that all which he can do in such a case, is to command them under pain of imprisonment to avoid fighting.

Moor 184.
3 H. 4. 9.
22 E. 4. 35.
10 Ed. 4. 13.
5 H. 7. 6.
Sav. 97, 98.

Sec. 15. But he is so far intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore, if an assault be made upon him, he may not only defend himself, but also imprison the offender, in the same manner as if he were no way a party.

5 H. 7. 6.
Summary 196.
1 Roll. 238.
2 Bull. 329.

Sec. 16. And if an affray be in a house, the constable may break open the doors to preserve the peace, and if affrayers fly to a house and he follow with fresh suit, he may break open the doors to take them.

13 Ed. 4. 9.
7 Ed. 3. 12.
Dalt. c. 8, 67
L. ab. 133, 13

Sec. 17. But it is said, That a constable hath no power to arrest a man for an affray done out of his own view, without a warrant from a justice of peace, unless a felony were done or likely to be done; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor does it follow from his having power to compel those to find sureties who break the peace in his presence, that he has the same power over those who break it in his absence, inasmuch as in such case it is most proper to be done by those who may examine the whole circumstances of the matter upon oath, which a constable cannot do; yet it is said, That he may carry those before a justice of peace, who were arrested by such as were present at an affray, and delivered by them into his hands.

C. El.
Owen 105.
Summary;
156.

Sec. 18. As to the fourth point, viz. In what manner an affray may be suppressed by a justice of peace; there is no doubt, but that he may and must do all such things to that purpose, which a private man or constable are either enabled, or required by the law to do. But it is said, That he cannot without a warrant authorize the arrest of any person for an affray out of his view; yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace.

Lamb. 137.
Dalt. c. 8.

Summary 196.
Dalt. c. 9.
B. F. Imp. 6.
12. 33
11 H.
Moor

Sec. 19. Also it seems, That a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for

See 38 Ed. 3.

there

23 Aff. 26.
3 Mod. 84.

Summary 36.
Dalt. c. 8.
Popham 153.

there does not seem to be any good authority, that these have any power at all to take sureties of such an offender; but it seems certain, That a justice of the peace has a discretionary power either to commit him, or to bail him, till the year and day be past; but it is said, that he ought to be very cautious how he takes bail, if the wound be dangerous; for that if the party die, and the offender appear not, he is in danger of being severely fined, if he shall appear upon the whole circumstances of the case to have been too favourable.

Sec. 20. As to the fifth point, *viz.* In what manner the several kinds of affrays are to be punished; it sufficiently appears from the foregoing part of this chapter, how such affrays as are accompanied with force and arms, are to be dealt with upon the statute of Northampton; and therefore I shall only examine in this place, what penalties other affrays are liable unto.

Aleg. 9.

As to which it is to be observed, That all affrays in general, are punished by fine and imprisonment, the measure of which is to be regulated by the discretion of the judges according to the circumstances of the case, which very much vary the nature of this crime, and in some cases make it so inconsiderable as scarce to deserve to be taken notice of; and in others make it an offence of a very heinous nature.

As in the following instances: First, In respect of the dangerous tendency thereof. Secondly, In respect of the persons against whom it is committed. Thirdly, In respect of the place wherein it happens.

Popham 153.
3 Inst. 158

1 Sid. 186.
1 Keb. 204.

Moor 503.

Sec. 21. And, First, An affray may receive an aggravation from the dangerous tendency thereof, as where persons coolly and deliberately engage in a duel, which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, as putting men under a necessity of righting themselves; upon which considerations, persons convicted of barely sending a challenge, have been adjudged to pay a fine of one hundred pounds, and to be imprisoned for one month without bail, and also to make a publick acknowledgement of their offence, and to be bound to their good behaviour.

Sec. 22. Secondly, An affray may receive another aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, as by the rescue of a person legally arrested, or the bare attempt to make such a rescue; for all the ministers of the law, are under its more immediate protection.

Sec. 23. Thirdly, An affray may receive a farther aggravation from the place wherein it is committed, and upon this respect

respect all affrays in the king's court are so severely punished, as hath been shewn already in chapter 21, and upon the same account also, all affrays in a church, or church-yard, have been always esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated. And upon this consideration, all irreverent behaviour in these places hath been esteemed so criminal by the makers of our laws, that they have not only severely punished such disturbances in them which are punishable wherever they happen, as all actual affrays, &c. but also such, which if they happen elsewhere, are not punishable at all; as bare quarrelsome words, and even such which would be commendable if done in another place; as arrests by virtue of legal process.

12 Co. 101.
1 Keb 290, 492
1 Mod. 186.

But, for the better understanding hereof, I shall consider the several statutes made for this purpose.

Stat. 24. And first, it is enacted by 5 & 6 Edw. 6. c. 4. "That if any person whatsoever, shall by words only quarrel, chide, or brawl, in any church or church-yard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesiæ*, and if he be a clerk, from the ministration of his office, for so long time as the same ordinary shall by his discretion think meet and convenient, according to the fault."

Stat. 25. And it is further enacted by the said statute, "That if any person shall smite or lay any violent hands upon any other, either in any church or church-yard; that then *ipso facto*, every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation."

Stat. 26. And it is also further enacted by the said statute, "That if any person shall maliciously strike any person with any weapon in any church or church-yard, or shall draw any weapon in any church or church-yard, to the intent to strike another with the same weapon; that then every person so offending, and thereof being convicted by verdict of twelve men, or by his own confession, or by two lawful witnesses, before the justices of assize, justices of oyer and terminer, or justices of peace in their sessions, by force of this act, shall be adjudged by the same justices before whom such person shall be convicted, to have one of his ears cut off, &c. and besides that every such to be, and stand *ipso facto* excommunicated, as aforesaid."

Stat.

Dyer 275.

C. Jac. 462.

1 Ven. 146.

Lit. 149.

Hett. 86.

C. 117. 919.

1 Burr. 245.

2 Ld. Ray. 85.

10 Mod. 65.

179.

1 Ventris 146.

B. R. H. 179.

68. 224.

B. Prohib. 14.

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C. Jac. 467.

C. Car. 467.

Nov 171.

1 Saund. 13.

12.

1 Sid. 309.

3 Keb. 124.

1 Mod. 163.

Secd. 27. And in the exposition hereof it hath been holden: First, That notwithstanding the words of the statute be expressed, That he who smites another in the church, &c. shall, *ipso facto*, be deemed excommunicate; yet there ought either to be a precedent conviction at law, which must be transmitted to the ordinary, or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there; for it is implied in every penal law, that no one shall incur the penalty thereof, till he be found guilty upon a lawful trial; also it must be intended in the construction of this statute, that the excommunication ought to appear judicially, for otherwise there could be no absolution. (1)

Secd. 28. Secondly, That he who strikes another in a church, &c. can no way excuse himself; by shewing that the other assaulted him.

Secd. 29. Thirdly, That church-wardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.

THIS act contains three distinct clauses levelled against three distinct offences in church and church yards. First, Quarrelling, clashing, or brawling by words only. Secondly, Smiting or beating violent hands. Thirdly, Striking with a weapon, or drawing one with intent to strike. The ecclesiastical court is not prohibited from proceeding upon the two first clauses; but as to the third clause there must be a previous conviction transmitted to the ordinary, &c. If any person or persons offend in either clause, they shall be prohibited. The proceedings of the ecclesiastical court are to keep each being *excommunicatus*, the one to punish, and the other to amend. 1 Burr. 217. Vin. 11 Mod. 200. Cathedral churches, and church yards, which belong to them, are within the statute. 1 L. 20. 248.

Secd. 30. Also it is enacted by 1 Mary, sess. 2. c. 3. That if any person or persons, of their own power and authority, shall willingly and of purpose by open and overt words, fact, act, or deed, maliciously or contemptuously mock, let, disturb, vex or trouble, or by any other unlawful ways and means, disquiet, or misuse, any preacher who shall be licensed, allowed, or authorized to preach by the Queen's highness, or by any archbishop, or bishop of this realm, or by any other lawful ordinary, or by any of the universities of *Oxford* and *Cambridge*, or otherwise lawfully authorized or charged, by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his, or their open sermons, &c. or if any person or persons shall maliciously, willingly, or of purpose, molest, let, disturb, disquiet, or otherwise trouble any parson, vicar, parish-priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments, or sacramentals, as most commonly frequented and used in the last year of

the reign of the late sovereign lord king Henry the Eighth, or that at any time hereafter should be allowed, set forth, ^{Si} or authorized by the queen's majesty; or if any person or ^{att} persons shall unlawfully, contemptuously, or maliciously, of their own power or authority, pull down, deface, spoil, or otherwise break any altar or altars, or any crucifix, or cross, in any church, chapel, or church-yard; every such offender and offenders, his or their aiders, procurers or abettors, may be apprehended by any constable, or churchwarden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence; and being so apprehended shall be brought before some justice of peace by whom they shall be committed forthwith, and within six days the matter shall be examined by the same, together with some other justices; and on proof by two witnesses, or confession, the offender shall be committed for three months, and also till the next quarter sessions, where, if they repent, they shall be discharged upon giving sureties for their good behaviour for a year, and if they do not repent they shall be committed till they do."

Stat. 31. It hath been resolved, That the disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service, as should afterwards be authorized by queen Mary, doth implicitly include such also as should be authorized by her successors; for since the king never dies, a prerogative given generally to one, goes of course to others.

Stat. 32. Also it is enacted by 1 Will. and Mary, c. 18. s. 19. "That if any person shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by the said act, and disturb or disquiet the same, or mislead any preacher or teacher, such persons, upon proof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of fifty pounds, and on default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence, at the said general or quarter sessions, shall suffer the pain and penalty of twenty pounds."

Lamb. 157.

(2) B. R. 1111
1708.

S. 163d 353.

K. 11w. 41. S.

Crom. 195, 196.

Dil. c. 22.

Moore 845.

forcible holding, and that such record is not traversable, because the justice of peace in making thereof, acts not as a minister but as a judge. Also it hath (a) lately been solemnly resolved in colonel *Leighton's case*, That the same justice may assess the fine for this offence, either before the time of conviction, or after; but it is said, That such justice of peace hath no power to commit the offender to gaol, unless he do it immediately upon the fact, or unless the offender shall afterwards refuse to find sureties for his good behaviour. Also it was holden by the court in *Leighton's case* abovementioned, That if a person, against whom a complaint shall be made as having been guilty of a forcible entry, shall either traverse the entry or the force, or plead that he has been three years in possession, the justice may summon a jury for the trial of such traverse, for it is impossible to determine it upon view; and if the justice have no power to try it, it would be easy for any one to elude the statute by the tender of such a traverse, and therefore by a necessary construction, the justice must needs have this power as incidental to what is expressly given him.

S. 163d 353.

2 B. R. 1111.

2 S. 163d 353.

K. 11w. 41. S.

Crom. 195, 196.

Dil. c. 22.

Moore 845.

Sec. 9. But this statute being likewise very defective in many respects, as in not giving any remedy against those who were guilty of a forcible detainer after a peaceful entry; nor even against those who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a justice of peace; and in not giving the justices of the peace any power to restore the party injured by such force to his possession; and also in not fixing any pain on the sheriff for not obeying the precepts of the justices in the execution of the said statutes; it was farther enacted by 8 Hen. 6. c. 9. "That from henceforth where
" any doth make any forcible entry in lands and tenements,
" or other possessions, or therein hold forcibly, after complaint
" thereof made within the same county where such entry is
" made, to the justices of the peace, or to one of them, by
" the party grieved, that the justices or justice so warned,
" within a convenient time, shall cause, or one of them shall
" cause, the said statute to be duly executed, and that at the
" costs of the party so grieved."

Sec. 10. And it is farther enacted by the said statute,
" That though such persons making such entries be present,
" or else departed before the coming of the said justices or
" justice, notwithstanding the same justices or justice in some
" good town next to the tenements so entered, or in some
" other convenient place according to their discretion, shall
" have, and either of them shall have, authority and power
" to enquire by the people of the same county, as well of
" them that make such forcible entries in lands and tenements,

ments, as of them which the same hold with force. And if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reſeize the lands and tenements ſo entered or holden as afore, and ſhall put the party ſo put out, in full poſſeſſion of the ſame lands and tenements, ſo entered or holden as before."

Sec. 11. And it is farther enacted by the ſaid ſtatute, That when the ſaid justices or justice make ſuch enquiries as before, they ſhall make, or one of them ſhall make, their warrants and precepts to be directed to the ſheriff of the ſame county, commanding him of the king's behalf, to cauſe to come before them, and every of them, ſufficient and different perſons, dwelling next about the lands ſo entered as before, to enquire of ſuch entries, whereof every man which ſhall be impanelled to enquire in this behalf, ſhall have land or tenement of the yearly value of forty ſhillings by the year, at the leaſt, above reſprizes, and that the ſheriff return iſſues upon every of them at the day of the firſt precept returnable, twenty ſhillings, and at the ſecond day forty ſhillings, and at the third time an hundred ſhillings, and at every day after the double. And if any ſheriff or bailiff within a franchise having return of the king's writ, be ſlack, and make not execution duly of the ſaid precepts to him directed to make ſuch enquiries, that he ſhall forfeit to the king twenty pounds for every default, and moreover ſhall make fine and ranſom to the king. And that as well the justices or justice aforeſaid, as the justices of aſſizes ſhall have power to hear and determine ſuch defaults of the ſaid ſheriffs and bailiffs, at the ſuit of the king, or of the party grieved, &c."

Sec. 12. And it is farther enacted by the ſaid ſtatute, That mayor, justices or justice of peace, ſheriffs and bailiffs of cities, towns and boroughs having franchise, have in the ſaid cities, towns and boroughs, like power to remove ſuch entries, and in other articles aforeſaid, riſing within the ſame, as the justices of peace, and ſheriffs in counties and countries aforeſaid have."

Sec. 13. But it is provided by the ſaid ſtatute, "That they who keep their poſſeſſions with force in any lands and tenements, whereof they or their anceſtors, or they whole eſtate they have in ſuch lands and tenements, have continued their poſſeſſions in the ſame by three years or more, be not endamaged by force of this ſtatute."

Sec. 14. And the ſaid proviſo was farther enforced and explained by 31 E. 3. c. 11. by which it is declared and enacted,

“ That no restitution upon any indictment of forcible entry, or holding with force, be made to any person, if the person so indicted, hath had the occupation, or been in quiet possession, for the space of three whole years together, next before the day of such indictment so found, and his estate therein not ended; which the party indicted may alledge for stay of restitution, and restitution to stay till that be tried, if the other will deny or traverse the same. And if the same allegation be tried against the same person so indicted, he is to pay such costs and damages to the other party, as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied, as is usual for costs and damages contained in judgments upon other actions.”

Sec. 15. In the construction of these statutes it was holden, *Crom. 161, 166.* That if a lessee for years, or copyholder were ousted, and the lessor, or lord, disseised, and such ouster as well as disseisin were found in an indictment of forcible entry, the court might in their discretion award a restitution of possession to such lessee or copyholder, which was by necessary consequence a reversion of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, Whether a lessee for years, or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 Hen. 6. the words whereof as to this purpose are, “ that the justice shall re-seise the lands &c.” by which it seems to be implied. That the party must be ousted of such an estate therein, whereof he may be said to be seised, which must be a freehold at least.

*Yelv. 31.
Crom. 1 Leon.
337.*

*Lamb. 105.
Crom. 71.
Dalt. c. 7.
Savil 68.
Faulkes, 123.*

Sec. 16. But to remove this doubt, it is enacted by 21 Jac. 1. c. 15. “ That such judges, justices, or justice of the peace, as by reason of any act or acts of parliament then in force, were authorized and enabled upon enquiry, to give restitution of possession unto tenants of any estate of freehold, of their lands or tenements, which shall be entered upon with force, or from them withholden by force, shall by reason of that act, have the like, and the same authority and ability from thenceforth (upon indictment of such forcible entries, or forcible withholdings before them duly found) to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knights-service, tenants by elegit, statute-merchant and staple, of lands or tenements, by them so holden, which shall be entered upon by force, or holden from them by force.”

Sec. 17. But it hath been holden, That a tenant by the verge, is not within this statute, because he is not within the express words; *sed quare*, for since such person hath no other evidence

*1st. 2. 172.
2d. 2. 172. 67.*

evidence of his title; but by the copy of court-roll, he seems at least to be within the meaning, if not within the words of the statute; however it seems clear, That if a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he hath no remedy for a restitution by force, of any of the above-mentioned statutes, for he cannot have it by 8 Hen. 6. because he always continued seised of the freehold, and clearly he is not within 21 Jac. 1. c. 15.

Vide Salk. 587.
Crom. 71. 166.
Dalt. c. 77.

Sec. 18. However there seems to be no doubt, but that a justice of peace, &c. may, in either of the said cases, remove the force, and commit the offender, &c.

Lamb. 155.
Crom. 71.
Dalt. c. 75.
2 Keb. 495.

Sec. 19. Having thus set forth the several statutes relating to this subject, together with the mischiefs which occasioned them, and the several defects of each of them, I shall, for the better understanding of them all in general, proceed to examine the following particulars. First, What shall be esteemed an entry within these statutes. Secondly, What entry is to be adjudged forcible. Thirdly, What detainer. Fourthly, In respect of what kind of possessions one may be guilty of such forcible entry or detainer. Fifthly, What persons may be guilty thereof. Sixthly, What ought to be the form of a record grounded upon these statutes. Seventhly, Of what kind of possessions a restitution is to be awarded. Eighthly, To whom such restitution ought to be made. Ninthly, By whom, and in what manner, it is to be awarded and given. Tenthly, In what cases it may be barred by the continuance of a possession for three years. Eleventhly, For what other causes it may be stayed. Twelfthly, How it may be superceded before it is executed. Lastly, How it may be set aside after it is executed.

Strange 443.
794.
Ld. Ray. 1514.

Sec. 20. As to the first point, viz. What shall be esteemed an entry within these statutes. It seems certain, That if one who pretends a title to lands, barely go over them, either with, or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for such like purpose, without doing any act, which either expressly or impliedly amounts to a claim of such lands, he cannot be said to make an entry thereinto within the meaning of these statutes.

Crom. 71.
Dalt. c. 77.

Sec. 21. Yet in such case, if he makes an actual claim with any circumstances, of force or terror, he seems to be guilty of a forcible entry within 1 & 15 Rich. 2. whether his adversary actually quit his possession or not.

Crom. 69.
Dalt. c. 77.
Con C. Car 486.
2 Com. Dig. 363.

Sec. 22. Also all those who accompany a man when he makes a forcible entry, shall be adjudged to enter with him, within the intent of these laws, whether they actually came upon the lands, or not.

Crom. 69.
Dalt. c. 77.
B. 2. c. 29. f. 4.

Crim. Co.
Inst. c. 77.
Crim. Lit. 256.

Sec. 23. So also shall those who having an estate in land by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto.

Crim. Co.
Inst. c. 77.
Crim. Lit. 256.

Sec. 24. But he who barely agrees to a forcible entry made to his use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he no way concurred in, or promoted the force.

Lamb. 140, &c.
Crim. Co. 77.
Crim. Lit. 257.
Inst. 137.
Crim. Lit. 256.
Crim. Lit. 256.

Sec. 25. As to the second point, viz. What entry is to be adjudged forcible, it seems clear, that it ought to be accompanied with some circumstances of actual violence or terror; and therefore that an entry which hath no other force than such as is implied by the law, in every trespass whatsoever, is not within these statutes.

And therefore for the better understanding hereof, I shall consider; First, In respect of what acts of violence an entry may be adjudged forcible. Secondly, In respect of what circumstances of terror,

Crim. Lit. 256, 138.
Crim. Lit. 256.
Crim. Lit. 256.

Sec. 26. As to the first of these particulars, It seems to be agreed, That an entry may be said to be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c. which being found in an assise of novel disseisin, will make the defendant a disseisor with force, and subject him to fine and imprisonment. And according to some opinions, an entry may be said to be forcible from the bare drawing up of a latch, or pulling back the bolt of a door; but surely such inconsiderable circumstances as these, which commonly pass between neighbour and neighbour, without any offence at all, can never bring a man within the meaning of these statutes, which speak of entries with strong hand, or multitude of people; and it hath been holden, That an entry into a house through a window, or by opening a door with a key, is not forcible. And it is said, That if one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession thereof, in the party's absence, yet he is not guilty of a forcible entry, inasmuch, as he did no violence to the house, but only to the person of the other. But perhaps this opinion may justly be questioned, because though the force be not actually done upon the land, nor in the very act of the entry, yet since it is used with an immediate intent to make such entry, and is the only

Moore, 626.
Lamb. 143.

Crim. Lit. 256.
Crim. Lit. 256.
Crim. Lit. 256.
Crim. Lit. 256.

cause it met with no opposition, surely it cannot be said, that the entry is without force, which whether it be upon, or off the land, seems equally within the statute.

Sec. 27. As to the second particular, *viz.* In respect of what circumstances of terror an entry may be adjudged forcible; it is to be observed, That wherever a man either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear, that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror, by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance, as if one say that he will keep his possession in spite of all men, &c.

Summary 128.
Lamb. 142, &c.
Dalt. c. 77.

10 H. 7. 12.
Crom. 69.

See the books
above cited.

Sec. 28. But it seemeth that no entry shall be judged forcible, from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage which is not personal.

B. Durst, 12.
16.
1 Inst. 253.
Dalt. c. 77.

Sec. 29. However it is clear, That it may be committed by a single person, as well as by twenty.

Lamb. 143.

Sec. 30. As to the third point, *viz.* What detainer is to be adjudged forcible, it seemeth certain, That the same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also; from whence it seems to follow, That whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter; and it hath been said, That he also shall come under the like construction, who places men at a distance from the house, in order to assault any one who shall attempt to make an entry into it; and that he also is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in: But it is said, That a man ought not to be adjudged guilty of this offence, for barely refusing to go out of a house, and continuing therein in despite of another.

Summary 133.

Lamb. 145.
Crom. 70, 71.
Summary 139.
Dalt. c. 77.
C. Jac. 199.

Sec. 31. As to the fourth point, *viz.* In respect of what kind of possessions one may be guilty of a forcible entry or detainer within those statutes, it seems clear, That one may come within the danger thereof by a force done to ecclesiastical possessions, as (a) churches, (b) vicaridge-houses, &c. as much as if the same were done to any temporal inheritance;

(a) 1 Sid. 101.
1 Lev. 90.
1 Keb. 438.
(b) C. Jac. 41.

also

(c) C. Car. 201.
 (d) 20 H. 6. 11.
 22 H. 6. 33.
 B. Force, 7.
 C. Car. 201.
 (e) C. Car. 201.
 (f) C. Car. 486.
 Dalt. c. 77.
 (g) C. Jac. 18.
 (h) C. Com. 63.
 Lamb. 144.
 Dalt. c. 77.

1 Mod. 72.
 2 Keb. 709.

Vide Inf. f. 40.

also it hath been holden for a general rule, That one may be indicted for a forcible entry into any such incorporeal hereditament, for which a (c) writ of entry will lie, either by the common law, as for (d) rent, or by statute, as for (e) tithes, &c. But I do not find any good authority, That such an indictment will lie for a (f) common or (g) office; but it seems agreed, That an indictment of forcible detainer lies against any one, whether he be the tenant or a stranger, who shall forcibly disturb the lawful (h) proprietor, in the enjoyment of any of the above-mentioned possessions; as by violently resisting a lord in his distresses for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. Yet it seems clear, That no one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement, which is no possession. Also it seemeth, That a man cannot be convicted upon view, by force of 15 Rich. 2. of a forcible detainer of any such tenement, wherein he cannot be said to have made a precedent forcible entry, because that statute gives the justices a jurisdiction of no other forcible detainer, but what follows a forcible entry.

Moore, 786.
 C. Jac. 18.
 2 Keb. 495.

Sec. 32. As to the fifth point, viz. Who may be guilty of a forcible entry or detainer within these statutes; it seems clear, That no one can come within the intention thereof by any force whatsoever done by him in entering into a tenement, whereof he himself had the sole and lawful possession, both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it; or by forcibly entering into the land in the possession of his own lessee at will. *Sed quare.*

8 Ed. 4. 9, 19.
 10 H. 7. 27.
 King & Marrow,
 9 Geo. 2.
 B. R. H. 174.

Litch. 224.
 Palmer 419.

Sec. 33. But it seems clear, That a jointenant, or tenant in common, may offend against the purport of these statutes, either by forcibly ejecting, or forcibly holding out his companion, for though the entry of such a tenant be lawful *per my & per tout*, so that he cannot in any case be punished in an action of trespass at the common law, yet the lawfulness of his entry no way excuses the violence, or lessens the injury done to his companion, and consequently an indictment of forcible entry into a moiety of a manor, &c. is good.

C. Lit. 256,
 257.
 C. Com. 69.
 Lamb. 160, 161.
 Dalt. c. 77.

Sec. 34. Also if a man have been in possession of land for never so long a time; by a defeasible title, and another who hath a right of entry thereunto, make a claim, and yet such wrongful possessor still continue his occupation with force and arms, he is punishable for a forcible entry and detainer against the purport of these statutes, because all the estate whereof he was seised before such claim, was wholly defeated by it,
 and

and his continuance in possession afterwards amounted in the judgment of law to a new entry.

Sec. 35. It is said, That an infant or feme covert may be guilty within the intention of these statutes, in respect of such actual violence as shall be done by them in person, but not in respect of what shall be done by others at their command, because all such commands of theirs are void: Also it is said, That a feme covert may be imprisoned for such offence, but that an infant ought not, because he shall not be subject to corporal punishment, by force of the general words of any statute, wherein he is not expressly named.

Dalt. c. 77.
Crom. 69.
Co. Lit. 357.

1 Hale 21.
B. Imp. 43, 45.

Sec. 36. As to the sixth point, viz. What ought to be the form of a record grounded upon these statutes, it hath been resolved, First, That it is sufficient in the caption of such an indictment, to say, that it was taken before *A. B. & C. D. Justiciariis ad pacem Domini Regis conservandam assignatis*, without shewing that they had authority to hear and determine felonies and trespasses; for the statute enables all justices of peace, as such, to take such indictments.

Palmer 277.
C. Jac. 633.

Sec. 37. Secondly, It hath also been resolved, That the tenement in which the force was committed, must be described with convenient certainty, for otherwise the defendant will neither know the special charge to which he is to make his defence, neither will the justices or sheriff know how to restore the injured party to his possession; and from hence it follows, That an indictment of a forcible entry into a (a) tenement (which may signify any thing whatsoever,) (b) wherein a man may have an estate of freehold, or into a house (c) or tenement, or into two closes of meadow (d) or pasture, or into a rood (e) or half a rood of land, or into (f) certain lands belonging to such a house, or into such a house, without shewing in what (g) town it lies, or into a (h) tenement with the appurtenances called *Trupenny* in D. is not good. But it hath been resolved, That an indictment for a forcible entry in (i) *domum mansionalem, sive messuagium*, &c. is good, for these are words equipollent: Also that such an indictment for an entry into a (k) close, called seigneur *Hern's* close, &c. without adding the number of acres, is good, for here is as much certainty as is required in an ejectment. And it hath been adjudged, that such indictment may be void as to such part thereof only which is uncertain, and good for so much as is certain, and therefore that an indictment for a forcible entry into a house, and certain acres of land thereto belonging, may be quashed as to the land, and stand good as to the house.

Dalt. c. 91.
8 Mod. 66.
12 Mod. 417.

(a) Dalt. 15.
2 Roll. 46.
2 R. Abi. 80.
3 Leon. 102.
(b) Co. Lit. 6.
(c) 2 R. Abr. 40.
1 Roll. 334.
C. Jac. 633.
Palmer 277.
(d) 2 R. Abr. 31.
(e) 1 Bull. 201.
(f) 2 Leon. 186.
3 Leon. 102.
B. Forc. Ent. 23.
(g) 2 Leon. 186.
(h) 2 R. Abr. 80.
(i) C. Jac. 633.
Palmer 277.
(k) C. Eliz. 458.
2 R. Abr. 80.

2 Leon. 186.
3 Leon. 102.

Sec. 38. Thirdly, It hath been also resolved, That an indictment on 5 or 15 Rich. 2. needs not shew who had the freehold at the time of the force, because those statutes seem equally

Sta 21 Jac. 1.
2 Keb. 495.
3 Bull. 71.

1 Ven. 23. 28.
1 Sid. 102. 5. 9.
11 Mod. 275.

1 Ven. 39.
2 Keb. 405.
Solk. 260.
Sayer 142, 225.

Hetley 73.
Litch 109.
2 Keb. 477, 499.
Lut. 1548.
1 Keb. 191.
C. Eliz. 754.
Noy 131.
2 Koll. 65.
1 Sid. 102.
Con. Yelv. 28.
1 Rylib. 177.
Show. 2-2.
Con. 1 Ven. 306.
3 Leon. 22.
Allen 49.
Palmer 27, 426.
Con. 2 R. A. 80.
Erc. Jac. 214.
335, 938.

21 B. 10.

Yelv. 165.

Farr. 125.

1 Ven. 5.

equally to punish all force of this kind, without any way regarding what estate the party had on whom it was made; yet it seems, That such an indictment ought to shew that such entry was made on the possession of some person, who had some estate in the tenements, either as a freeholder or lessee for years, &c. for otherwise it doth not appear, that such entry was made injurious to any one. But it is said, That an indictment on 8 Hen. 6. must shew, that the place wherein the force was committed was the freehold of the party grieved at the time of such force; and therefore, That it is not sufficient to say that the defendant with strong hand, &c. entered into such a house, *existens liberum tenementum f. s. &c.* without saying, *adunc existens liberum tenementum f. s.* for otherwise it may be intended, that it was his freehold at the time of the indictment only, and not at the time of the force; and according to the general opinion, an indictment on that statute cannot warrant an award of restitution, unless it find, that the party was seised at the time. Yet it is said, That the want of such an express finding may be supplied by such words as necessarily imply, that the party was seised at the time of the force; as where it is expressly laid that the defendant disseised *f. s. &c.* which is impossible, unless he had been seised of the freehold at the same time; and it hath been said, That it is sufficient in such an indictment to say that the party was *possessionatus pro termino vite*, without using the word *seisitus*, &c. for the same propriety of expression is not required in indictments as pleadings; *sed quærs.* Also it is said, That if it do appear either in such an express or implicit manner, that the party injured had the freehold of the land at the time of the force, it is not necessary to shew farther what estate in particular he had therein, or by what title he claims the same; for it is not the title, but the possession, which is in question. And upon the like ground it hath been adjudged, That an indictment on the said statute for entering on my farmer, and forcibly expelling him, and disseising me, is good, without shewing what estate such farmer had; for it is sufficient to shew that he had the possession, and the injury complained of is the forcible disseisin done to me, which, being the main point of the indictment, if it be sufficiently set forth in substance, the indictment is good; yet in this very case the want of shewing that such farmer was ousted, would have been an incurable fault; because his possession being my possession, unless he were ousted, I could not be disseised. Also it hath been holden, That as an indictment on 8 Hen. 6. must shew that the party who is put out of possession was seised of a freehold, in order to bring him within the purview of that statute, so also an indictment on 21 Jac. 1. c. 15. must shew, That the party injured was possess'd of such an estate, as will bring him within the provision of that act; and upon this ground it hath been resolved, That such an indictment, setting forth in

general,

general, That the party was possessed, or that he was possessed for a certain term, without adding, that it was for years, is not good; for in the first case it may be intended, That he was possessed only by virtue of a lease at will; and in the second, That he was possessed of a term for life; in neither of which cases he is within the benefit of 21 Jac. 1. c. 15. Yet it hath been said, That the possession of such an estate, as is within that statute, is sufficiently set forth in the reciting part of an indictment, as thus, *quod cum J. S. was possessed for a certain term of years, and being so possessed, was by strong hand, &c. put out of possession, &c. without any direct allegation of such a possession.*

Sect. 39. Fourthly, it hath been resolved, That a repugnancy in setting forth the offence in an indictment upon any of these statutes, is an incurable fault; and upon this foundation it hath been adjudged, That an indictment on 8 Hen. 6. setting forth, that the defendants *pacifice intraverunt, &c. & cum adtunc & ibidem vi & armis disseverunt*, or that *J. S. was seized and possessed*, is void; and it hath also been adjudged, That an indictment on 21 Jac. 1. setting forth, That the party injured was possessed of a term for years, or of a copyhold estate, and that the defendants with strong hand ousted and disseised him, is void, because it is absurd and contradictory to set forth a disseisin of such an estate whereof it is impossible that any man can be disseised; also it hath been holden, That an indictment on 8 Hen. 6. setting forth a disseisin of land, *adtunc & adhuc existens liberum tenementum J. S. is void for its repugnancy*, inasmuch as it implies, That *J. S. always continued in possession*, which, if it be true, makes it impossible that he could be disseised at all; but some have said that this seeming repugnancy may be reconciled, by intending that the disseisee might re-enter after the time of the disseisin, and before the finding of the indictment; however it seems clear, That if the words *adhuc extraneus* be added, such a repugnancy cannot be helped by any intendment; and that no restitution can be awarded on such an indictment, whether those words *adhuc extraneus* be in it or not, because the party grieved appears by the indictment itself to have had the freehold at the time of the finding thereof.

Sect. 40. Fifthly, It hath been resolved, That an indictment of a forcible detainer, without shewing that the defendant made an entry into the same lands, is not good, because the statute doth not prohibit one who hath always been in possession, to maintain the same with force. And it seems clear, That a conviction of a forcible detainer upon view, by force of 15 Rich. 2. cannot be good, unless it shew that the defendant was also guilty of a forcible entry, for the words of that statute are, "That at all times that such forcible entries are made, and complaint thereof cometh to the jus-

1 Sid. 102.
1 Mod. 72.
2 Keb. 709.
Salk. 260.
Faulc. 123.

1 Mod. 73.

Allyn 20.
Show. 272.
1 Vert. 108.
Popham 205.
Raymond 67.
1 Keb. 423, 423.
435, 472.

2 Roll. 317.
Salk. 27.
2 Bull. 111.
1 Sid. 132.

2 R. Abt. 30.

Palmer. 195, 106.
197.
C. Jac. 19, 21.
32.
C. Eliz. 95.

"ti es,

"tices, &c. that the same justices, &c. shall go, &c. and if they find any that hold such place forcibly, after such entry made, &c." by which it is plain, That the justices have no jurisdiction by force of this statute, but where the entry, as well as detainer, was forcible: Yet in *Leighton's* case it was resolved, That such a forcible entry is sufficiently set forth in the complaint recited in such a conviction; and it is plain, That the statute could not intend that the forcible entry should be viewed, because it is to precede the proceedings of the justices; but perhaps it is the better opinion, That an indictment upon 8 Hen. 6. setting forth an entry and forcible detainer, without shewing whether the entry were forcible or peaceable, is good; for there is no *medium* between a forcible and peaceable entry; and an entry not alledged to have been forcible, shall be intended to have been peaceable, or if not so, yet it seems to be no way material, whether it shall be taken to have been forcible or peaceable, because in either case it is equally within the statute, the words whereof as to this purpose are, "Where any doth make forcible entry in lands and tenements, or other possessions, or them hold forcibly;" by which it appears, That a forcible detainer is a distinct offence from that of a forcible entry, and no way depending on it; and my lord chief justice Holt seemed to be of this opinion in *Leighton's* case above-mentioned. However it seems to be certain, That if a bill both for a forcible entry and forcible detainer be preferred to a grand jury, and found *ignoramus* as to the entry with force, and *billa vera* as to the detainer, it will not warrant an award of restitution, but is void, because the grand jury cannot find a bill true for part, (*u*) and false for part, as a petit jury may.

2 R. Abr. 80.

Yelv. 99.
C. Jac. 151.
1 Sid. 97, 99,
414.
2 Keb. 505.
Vide inf. f. 59.
B. 2. c. 25. f. 2.

(a) Vide *Rex*
v. Fieldhouse,
Cowper 325.

Salk. 260.
B. Force, 13.
Lamb. 153.
Dalt. c. 81.
Summary 140.
Hard. C. 174.
Savil 68.
Strange. 474.

Sett. 41. Sixthly, It hath been resolved, That no indictment can warrant an award of restitution, unless it find that the wrong-doer both ousted the party grieved, and also continueth his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is vain to award it to one who doth not appear to have lost it.

Sett. 42. Seventhly, It hath been resolved, that the time and place of the disseisin are sufficiently set forth in an indictment, alledging, That the defendant *tali die intravit, &c. & ipsum A. B. manu forti disseisivit*, without adding the words *ad tunc & ibidem*; for inasmuch as the entry and disseisin are both of them of the same nature, and the one of them naturally tends to cause the other, it is implied, that they both happened at the same time; and the forcible entry being the principal offence within the purview of these statutes, and the disseisin being only added to shew that the party grieved hath a right to a restitution, as to which the day of the disseisin is no

way

way material, it seemeth to be over nice to require a precise exactness in setting it forth; neither can it be to any purpose to alledge that the disseisin was at the same place with the entry; since it appears from the nature of the thing, that it could not but be so. Yet in an indictment of murder, it is perhaps a fatal mistake, not expressly to shew the day and place of the stroke, as well as of the assault, because these offences are of different kinds, the one being only a trespass, and the other a felony, and may well be intended to have happened at different times and places, and the giving of the stroke being the principal offence, ought to be set forth with the most exact certainty.

B. & C. 23. f. 82.

Dyer 68.

Sett. 43. Eighthly, It hath been resolved, That a disseisin is sufficiently set forth, by alledging, That the defendant entered, &c. into such a tenement and disseised the party, without adding, either the words (a) *illicite*, or (b) *expulsi*, (c) *inde*, for the word *disseisivit* implies as much.

Sayer 225.

(a) Noy 125.
(b) C. Jac. 3.
(c) C. Eliz. 80.
Con. Noy 120.

Sett. 44. Ninthly, It hath been resolved, That an indictment which pursues the words of the statute in alledging an entry, &c. to have been made *manu forti*, needs not expressly also to say, That it was made *vi et armis*, because that is implied. Also it is said, That as the want of those words will not vitiate an indictment, which pursues the statute, so neither will the using of them make good an indictment which does not pursue it; yet it hath been resolved, That such an indictment may be good without mentioning any complaint, though the statute seems to require it; for it is said, That those words in the statute are put in *causa abundanti*; and that if a justice of peace have by any means whatsoever notice of a forcible entry or detainer, he may and ought to proceed against the same according to the said statute, as being a disturbance of the publick peace, the preservation whereof was the chief end of these statutes.

11 Mod. 275.
C. Eliz. 461.
Lath. 222.
2 Bull. 258.
B. & C. 25. f. 92.
Con. 1 Keb. 572.
2 Keb. 133. 135.
1 Vent. 265.
3 Burr. 1732.
3 Burr. 1699.7 Ed. 4. 18.
Dalt. 25.

Sett. 45. As to the seventh point, *viz.* Of what kind of possessions a restitution is to be awarded; it seems that it ought only to be awarded for the possession of such tenements as are visible and corporeal; for no one who hath a right to such as are invisible and incorporeal, as rents, commons, &c. can be put out of possession thereof, but only at his own election, by a fiction of law, in order to enable him to recover damages against the person who hath wrongfully disturbed him in the enjoyment of them; for such things being mere creatures of the law, and depending entirely upon the construction thereof, are always in the possession of those whom the law adjudges to have a right to such possession, and consequently all the remedy that can be desired against a force offered to a

Dalt. c. 87.
Lamb. 153.

Co. Lit. 325.

man in respect of such like possessions, is to have the actual force removed, and the offenders punished for the same, which may be done by the force of 15 Rich. 2. &c.

Dult. c. 83.
Lamb. 153.

Lamb. 154.
Dult. c. 83.
Vide C. Jac. 199.

Sec. 46. As to the eighth point, *viz.* To whom such restitution ought to be made; it hath been holden, That it shall only be given to him who is found by the indictment to have been put out of an actual possession, and consequently that it shall not be awarded to one who was only seised in law, as to an heir upon whom a stranger abateth upon the death of the ancestor, before any actual entry made by such heir; and from the same ground it followeth, That it shall not be granted to an heir upon an indictment, finding a forcible entry made upon his ancestor.

Crom. 162, 163.

Sec. 47. It hath been holden by some, That if a disseisee re-enter peaceably upon the disseisor, and continue for some time peaceably upon the tenements in dispute, and afterwards detain them with force, the disseisor shall not be restored upon an indictment finding the said force, because his possession was at first peaceably defeated, and at the time of the force, he had, in the judgment of law, no possession at all. But I cannot be persuaded that this opinion is agreeable to the intention of the said statutes, the principal end whereof seems to be to oblige all persons to refer themselves to the courts of justice, for the decision of their claims to the possession of land, and to restrain them from disturbing the public peace, by such endeavours to right themselves; but if such a practice as this should be allowed, it would be easy to evade the effect thereof by refraining from violence at first, and then forcing the party to leave the possession of the premises after a short continuance thereon in peace; neither do I see any difference between such a continuance for the space of three days, and a continuance for three hours or minutes, inasmuch as the subsequent force is in each case equally within the mischief intended to be provided against by the statutes; and seeing the statutes of 8 Hen. 6. and 31. Eliz. c. 11. have expressly provided, That those who have been in possession for three years, shall not be put out of possession by an indictment of forcible entry or detainer; it seems plainly to be implied, That no one shall have the like advantage, in respect of a possession for a shorter time,

Sec. 48. It will be needless in this place to shew of what kind of hereditaments, or of what kind of estate therein, the party who is to be restored must be found to have been seised or possessed, because this may sufficiently appear by what hath been said in the foregoing part of this chapter.

Comyns 61.

Sec. 49. As to the ninth point, *viz.* By whom and in what manner such restitution may be awarded and given; there is no doubt, but that the same justice, before whom an indictment

indictment of forcible entry or detainer shall be found, Dalt. c. 82.
may grant an award of restitution to the party, and it is said, Dyer 187.
That he may execute the same either in his own proper person, 12 Mod. 495.
or make his precept to the sheriff to do it.

Sett. 50. But it seems clear, That neither justices of peace, † Sid. 136.
nor any other court whatsoever, have authority to grant a res- 1 Keb. 88.
titution upon a conviction of any force taken by them upon 1 Veni. 308.
view, unless the same be found by an indictment, according to Dyer 187.
the direction of 8 Hen. 6. c. 9. or 21 Jac. 1. c. 15. (2) Also Dalt. c. 82.
it seems to be agreed, That no other justices of peace, except Lamb. 184.
those before whom such an indictment shall be found, have any (a) Vide 3 Com.
power, either at sessions, or out of it, to make any award of Dig. 356. where
restitution; and that no other court whatsoever can per- it is said that a
sonally restore the party without a precept to the sheriff. justice of peace
or sheriff may
break open a
house to make
restitution.

Sett. 51. Also it hath been resolved, that justices of oyer Kellw. 159.
and terminer have no power, either to inquire of a forcible Dalt. 25.
entry or detainer, or to award restitution on any such in- 9 Co. 118.
dictment; because when a new power is created by sta- 12 Co. 85.
tute, and certain justices are assigned to execute it, it can-
not regularly be executed by any other; and inasmuch as justices
of oyer and terminer have a commission entirely distinct from
that of justices of peace, they shall not from the general words of
their commission, *Al inquirere de omnibus transgr' & de omnibus*
aliis articulis & causis cont' formam quorumcunque statutorum facti
sive perpetrati, be construed to have any such powers as are
specially limited to justices of peace. Yet it hath been resolved, Ferrar. 138.
That the justices of the King's Bench may award restitution upon 7 Ed. 4. 18.
an indictment of forcible entry or detainer removed before 4 H. 7. 18.
them, because the said justices having a supreme and sovereign Dalt. c. 82.
jurisdiction over all matters of a criminal and publick nature,
have always been esteemed to have power in all causes of this
nature, being brought judicially before them, to give the par-
ties such remedies in relation thereto, as they shall appear to
have a right to demand, either by common law, or by statute.

Sett. 52. The sheriff, if need be, may raise the power Lumb. 157.
of the county to assist him in the execution of a precept of Dalt. c. 82.
restitution, and therefore, if he make a return thereto, that
he could not make a restitution by reason of resistance, he
shall be amerced.

Sett. 53. As to the tenth point, viz: How such restitu- Salkeld 260.
tion should be barred by the continuance of a possession for Carthew 496.
three years; it appears from the above-mentioned proviso of 12 Mod 203.
8 Hen. 6. and also by 31 Eliz. c. 11. That any one indicted Ferrar 138.
upon these statutes, may alledge such possession to stay the Dalt. 2079.
award of restitution; in the construction whereof it hath been Crofton 71.
holden, That such possession must have continued without in- Summary 139.
terruption. Dyer 141.
22 H. 6. 29.

B. Force, 22, 29.
1 Inst. 256.
Raymond 85.
1 Sid. 149.

interruption during three whole years next before the indictment; and therefore that he who having been in possession of land for three years or more, is forcibly ousted, and then restored by force of the statute of 8 Hen. 6. cannot justify a forcible detainer, till he have been in possession again for three years after such restitution; and also for the same reason it hath been said, That he who under a defeasible title hath been never so long in possession of land to which another hath a right of entry, cannot justify such a detainer at any time within three years after a claim made by him who hath such a right, because all defeasible estates in the land are wholly defeated by such a claim, and the subsequent continuance in possession amounted to a new entry.

Dale, c. 79.
22 H. 6. 18.
Crompton 71.

Holding over by force, when the tenants title was under a lease now expired, is said to be a forcible detainer.

Cro. Jac. 199.

Self. 54. There have been some opinions, That the three years possession must be of a lawful estate, and consequently that a disseisor's continuance in quiet possession for never so many years, shall not justify a forcible detainer; but it seems necessary to make a distinction between a detainer against him who has a right of entry, and a detainer against a stranger, or one who by his laches has lost his right of entry; for I do not see why three years continuance of a defeasible possession should not justify a detainer by force against a stranger, inasmuch as he cannot take advantage of another's right, and bare possession is a good title against all persons, except him who hath the right, and cannot be lawfully defeated by any other. Also if one who has the mere right to lands, have so long neglected to recover the possession thereof, till in judgment of law he hath no more right to such possession, till he have recovered it by action, than a mere stranger, there doth not seem to be any reason that he should have more advantage against a forcible detainer, than if he were a mere stranger.

4 Comm. 149.

Self. 55. Also it hath been holden, That a peaceable continuance in possession for three years after a forcible entry, under any title whatsoever, will not justify a forcible detainer, inasmuch as the possession was at first gained by force. But I cannot think this a reasonable construction of the said statutes, for the force in the detainer being after three years quiet possession, seems justifiable by the express words of the statute; and where the force used in gaining a possession is afterwards wholly laid aside, there seems to be no colour to say, That it makes the subsequent possession less quiet or peaceable than it would have been, if there had been no force at all used at the first.

4 Kel. 538.
R. v. Burgess.
Sabbell 267.

Self. 56. It seems clear from the express purview of the said statute of 31 Eliz. c. 11. That wherever the defendant pleadeth such a possession in bar of restitution upon such an indictment, either before the justices of peace, or in the king's bench, no restitution ought to be awarded till the truth of the plea

plea be tried; and it hath been holden, That the plea of such a possession is good, without shewing under what title, or of what estate such possession was, because it is not the title, but the possession only, which is material in this case.

1 Sid. 149.
Raym. 84.
1 Ven. 265.

Self. 57. It seems that from the wording of 31 Eliz. c. 11. if one who has been in possession for three years, be ousted, and the same day re-enter with force, and also be indicted for such re-entry on the very same day, it may be questioned whether the prosecutor ought to have restitution, inasmuch as the words of the statute are, "That there shall be no restitution, &c. if the person indicted have been in quiet possession for three years next before the day of the indictment found;" and here the defendant hath been in possession three years before the day of the indictment, though not three years before the indictment, inasmuch, as he was ousted the same day. But if it be considered, That the circumstance of finding the indictment on that day no way affects the merits of the case, or lessens the offence any more than if it were found in any other day; and that restitution must have been awarded if it had been found on another day; and that the mischief complained of in the preamble is, that persons were by colour of such indictments often turned out of their possessions which they had quietly enjoyed for three years next before such indictments found, which does not extend to the defendant in the present case, I rather incline to think, that restitution might be awarded to the prosecutor in this case, inasmuch as it clearly appears, That the defendant's possession hath not had three years uninterrupted continuance within the intent of the statute.

4 Comm. 146.

1 Burr. 190.

Self. 58. As to the eleventh point, viz. For what other causes such restitution may be stayed; it seemeth to be settled at this day, That if the defendant tender a traverse of the force, which must be done in writing, and not by a bare denial of the force by parol, the justice ought not to make any restitution, till the traverse be tried; in order whereunto he must award a *venire facias*, whereon a jury must be returned, on whose verdict the award of restitution ought to depend.

1 Keb. 543.
2 Ken. 49.
1 Sid. 284.
Balk. 587, 596.

Cases, tempus
Hurwicke, 1.
175.

Self. 59. It hath been resolved, That if such a jury find part of the indictment to be true, and part of it to be false, yet if they find so much thereof to be true as will warrant a restitution, the justice ought to restore the party: as where, on an indictment of forcible entry and forcible detainer, the jury find that the entry was peaceful, and the detainer was only forcible.

1 Sid. 97, 99.
1 Keb. 447.

Self. 60. As the justice is bound to stay the award of restitution, upon the defendant's tendering a traverse of the force, so it hath also been said, That he ought not to make such an award in any case in the defendant's absence, without calling him to answer for himself; for it is implied by natural justice, in

Sevil 68.
Aleyn 78.

the construction of all laws, That no one ought to suffer any prejudice thereby, without having first an opportunity of defending himself.

Dyer 187.
Summary 140.
Crom. 165.
Dart. c. 81, 84.

Sett. 61. As to the twelfth point, viz. How such a restitution may be superseded before it is executed; there is no doubt but that the same justices, by whom a restitution is awarded upon an indictment of forcible entry or detainer found before them, may also afterwards, upon an insufficiency of the indictment appearing unto them, supersede the same before it is executed: And it hath also been said, That if such an indictment be taken, and restitution awarded by four or five justices, that two or even one of the same justices may supersede the execution thereof, as well as more or all of them. But it seems to be agreed, That no other justices, or other court whatsoever, have such power, except the King's Bench.

C. Eliz. 115.
Yelv. 32.
Moor. 677.
1 Keb. 93.
Summary 141.
Stounge 474.

Sett. 62. However it is certain, that a *certiorari* from the King's Bench is a *superfedeas* to such restitution; for every such *certiorari* has these words *ceram nobis terminari volumus Et alibi*, and consequently it wholly *okays* the hands of the justices of peace, and avoids any restitution which is executed after the *teste*, but does not bring the justices of the peace, &c. into a contempt, unless they proceed after the delivering thereof.

Sayer 176.

Sett. 63. As to the thirteenth point, viz. How such restitution may be set aside after it is executed; it is certain, That the justices of the King's Bench, having a general superintendent power over all the proceedings whatsoever of justices of peace, may set aside any such restitution, if it shall appear to them to have been either awarded or executed against law; as where the indictment whereon it was grounded, being removed before them, appears to be insufficient, and thereupon is quashed; or the defendant traverses the force and gets a verdict in the King's Bench, or wherever it sufficiently appears that the justices of peace have been irregular in their proceedings, as by refusing to try a traverse of force tendered by the defendant, &c.

Said 65.
Sum. 140, 141.
C. Eliz. 11.
Sup. l. 58.

Key 110.
Yelv. 80.
C. Jac. 148, 149.

Sett. 64. Yet if an indictment on these statutes be removed into the King's Bench, and the defendant having been turned out of possession by the grant of restitution to the prosecutor by the justices of peace, traverse the force in the King's Bench, and then the offence be pardoned by a general pardon, the court cannot proceed on the trial, notwithstanding the defendant would waive the benefit of the pardon, because it appears judicially, That the king can have no benefit of a fine from the defendant if the verdict pass against him; and the court will never falsify an indictment, which is found

B. 2, c. 37.
l. 63.

by the oaths of twelve men, by bare affidavits; and consequently in this case the defendant can have no remedy to set aside the restitution by controverting the truth of the indictment.

SECT. 65. Neither can a defendant in any case whatsoever, *ex rigore juris*, demand a restitution, either upon the quashing of the indictment, or a verdict for him on a traverse thereof, &c. for the power of granting a restitution is vested in the King's Bench, only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes; and is never made use of by that court, but when upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor,

Raymond 85.
1 Keb. 343, 508.
2 Keb. 505.
Summary 141.
C. Eliz. 916.
Salk. 587.
Dyer 123.
2 Keb. 571.
Basil 66.

SECT. 66. The court of King's Bench hath been so favourable to one, who, upon his traverse of an indictment upon these statutes being found for him, hath appeared to have been unjustly put out of his possession, that they have awarded him a re-restitution, notwithstanding it hath been shewn to the court, that since the restitution granted upon the indictment, a stranger hath recovered the possession of the same land in the lord's court,

C. Eliz. 47.

For the form of
the indictment
vide 2 Burn's
Justice 420

CHAPTER THE SIXTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

IN treating of riots, routs, and unlawful assemblies, I shall consider, First, What shall be called a riot, rout, or unlawful assembly. Secondly, How they may be suppressed and punished by the common law. Thirdly, How by statute.

12 Mod. 510.

SECT. 1. A RIOT seems to be a tumultuous disturbance of the peace, by three persons, (a) or more, assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (b)

(a) Vide 1 Ven.
251.
Salk. 594, 505.
Dalt. c. 85, 86,
87.
Crom. 61, &c.
Pulton 27, &c.
3 Inst. 176.
Summary 137.
3 Mod. 151.
(b) See Salk.

594. Popham 202. 1 Ld. Ray. 484. 12 Mod. 262, 509. Strange 196. 12 Mod. 115, 116.
117. 1 Black. 350.

For the better understanding whereof, I shall consider the following particulars:—First, How far such an assembly may become riotous through the want of legal authority expressed or implied, or be excusable by reason of such authority.—Secondly, How far the intention with which the parties assemble together must be unlawful.—Thirdly, With what kind of violence or terror the intended enterprize must be executed.—Fourthly, How far the grievance intended to be redressed must be of a private nature.—Fifthly, Whether the unlawful execution of an act in its own nature lawful may not make an assembly riotous.

Sect. 2. As to the first point it seems, That wherever more than three persons (1) use force and violence, in the execution of any design whatever wherein the law does not allow the use of such force, all who are concerned therein are rioters. (A) But in some cases wherein the law authorizes force, it is not only lawful, but also commendable to make use of it; as for a (a) sheriff or (b) constable, or perhaps even for a private (c) person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters, and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of lands. Also it seems to be the duty of a (d) sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute the same, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not (e) to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain, That they are highly punishable for using any needless outrage, or violence therein.

(1) The words "more than three persons," are three times over (ff. 2. 5. 7.) inserted instead of "three persons or more," an instance, that in a variety of matter it is impossible for the mind of man to be always equally attentive. 4 Burn. 88. (A) Burr. 1762. *K. v. Scott and Harris*. 1 Black. 350. (a) 2 And. 67. *Popish* 121. (b) 3 H. 7. 10. (c) *Pop.* 121. *Minor* 656. *Infra* c. 47. f. 8. (d) 2 Inst. 103. (e) 3 Inst. 101. 2 Inst. 193. *Hob.* 62, 264.

Lamb. 179. *McC.* Dalt. c. 36. *Crom.* 61, 62. 6 Mod. 41. *Skepp.* 118. *Balk.* 595.

Sect. 3. As to the second point, viz. How far the intention with which such persons assemble together must be unlawful; it seems agreed, That if a number of persons being met together at a fair or market, or church-ale, or any other lawful or innocent occasion happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace, happened unexpectedly without any previous intention concerning it. Yet it is said, That if persons, innocently assembled together, do afterwards upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly

properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design: However it seems clear, That if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters, because their associating themselves together for such a new purpose, is no way extenuated by their having met at first upon another. Also it seems to be certain, That if a person seeing others actually engaged in a riot, do join himself unto them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself unto them, with an intention to second them in the execution of their unlawful enterprize; and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot, were in truth one of the first assembly, or actually had a previous knowledge of the design thereof.

Vide Rex vs.
J. du Royce,
Burr. 2073.

6 Modern 43.

Sett. 4. As to the third point, viz. With what kind of violence or terror, the intended enterprize must be executed, it hath been holden, That it ought to be accompanied with some offer of violence, either to the person of a man or to his possessions, as by beating him, or forcing him to quit the possession of his lands or goods, &c. And from hence it seems to follow, That persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly.

Dalt. c. 8c.
Lamb. 175.
3 Inst. 176.

Sett. 5. However, it seems to be clearly agreed, That in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the shew (1) of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*: (2) And from hence it clearly follows, That assemblies at wakes, or other festival times, or meetings for exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. And from the same ground also it seems to follow, That it is possible for more than three persons (3) to assemble together, with an intention

(1) Lamb. 178.
Dalt. c. 87c.
1 H. 7. 1.
6 Mod. 141.
2 Keb. 552.
Con. 1. Roll.
109.
3 Inst. 125.
11 Mod. 116.
Lamb. 179.

(1) Vide the opinion of Holt, C. J. in the case of the Queen v. Sales, 11 Modern 115.

(3) It should be "three persons or more," vide note (1) to Section 2.

Pulton 25.
3 Keb. 578.
Hobart 91.

Lamhard 172.
Connton 621.
Quare.

6 Mod. 147.
2 Keb. 518.
Con. 1 Mod. 13.
3 V. 169, 180.
11 Modern 116.

to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a competent number of people assemble together, in order to carry off a piece of timber to which one of the company hath a pretended right, and afterwards do carry it away without any threatening words, or other circumstances of terror. And from the same ground it seems also to follow, That persons assembled together in a peaceful manner to do a thing prohibited by statute, as to celebrate mass, &c. and afterwards peacefully performing the thing intended, cannot be said to be rioters; for there seems to be no reason why an assembly should become riotous barely for doing a thing contrary to statute, any more than for doing a thing contrary to common law.

Sec. 6. As to the fourth point, *viz.* How far the grievance intended to be redressed must be of a private nature; it seems agreed, That the injury or grievance complained of, and intended to be revenged or remedied by such an assembly; must relate to some private quarrel only; as the inclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements, the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, no way concerning the publick; for wherever the intention of such an assembly is to redress publick grievances, as to pull down all inclosures in general, or to reform religion, or to remove evil counsellors from the king, &c. if they attempt with force to execute such their intentions, they are in the eye of the law guilty of levying war against the king, and consequently of high treason, as appears from chapter seventeen, section twenty-five.

Quare and v.
Balk. 594, 60.
Crom. 64, 6.
Dalton c. 27.

(4) It should be
"three persons
or more," vide
sect. 2.

3 Modern 3.
11 Mod. 117.
2 Show. 276.
22 Mod. 648.

Sec. 7. As to the fifth point, *viz.* Whether the execution of an act in its own nature lawful, may make an assembly riotous; it hath been generally holden, That it is no way material whether the act intended to be done by such an assembly, be of itself lawful, or unlawful; from whence it follows, That if more than three persons (4) assist a man to make a forcible entry into lands, to which one of them has a good right of entry, or if the like number in a violent and tumultuous manner join together in removing a nuisance, which may lawfully be done in a peaceful manner, they are as properly rioters, as if the act intended to be done by them were never so unlawful; for the law will not suffer persons to seek redress of their private grievances, by such dangerous disturbances of the publick peace: However the justice of the quarrel in which such an assembly doth engage, is certainly a great mitigation of the offence.

Sec. 8. A Rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing, which if it be executed

ted will make them rioters, and actually making a motion towards the execution thereof: But by some books, the notion of a rout is confined to such assemblies only, as are occasioned by some grievance common to all the company; as the inclosure of land in which they all claim a right of common, &c. However inasmuch as it generally agrees with a riot as to all the rest of the above-mentioned particulars, requisite to constitute a riot, which have been already fully explained, except only in this, That it may be a compleat offence without the execution of the intended enterprize, it seems not to require any farther explication.

Lamb. 175, 176.
Crom. 61.
Dalt. c. 35.
B. Riots, 4, 5.
Pulton 25.

SECT. 9. AN UNLAWFUL ASSEMBLY, according to the common-opinion, is a disturbance of the peace by persons barely assembling together, with an intention to do a thing, which if it were executed would make them rioters, but neither actually executing it, nor making a motion toward the execution it. But this seems to be much too narrow a definition. For any meeting whatsoever of great numbers of people with such circumstances of terror, as cannot but endanger the publick peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly.

Crompton 61.
B. Riots, 4.
Pulton 25.
Dalt. c. 95.

Hobart 92.
Salk. 594, 595.
1 Ven. 369, 380.

SECT. 10. Also an assembly of a man's friends for the defence of his person, against those who threaten to beat him, if he go to such a market, &c. is unlawful; for he who is in fear of such insults, must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. Yet an assembly of a man's friends in his own house, for the defence of the possession thereof, against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle.

21 H. 7. 39.
Lamb. 179, 180.
Summary 137.
Crom. 64.
B. Riots, 1.
5 Co. 91.
11 Mod. 116.

SECT. 11. As to the second point, viz. How far offences of this nature may be suppressed and punished by the common law; it seems clear, That every sheriff, under-sheriff, and also every other peace officer, as constables, &c. may and ought to do all that in them lies towards the suppressing of a riot, and may command all other persons whatsoever to assist them therein. Also it is certain, That any private person may lawfully endeavour to appease all such disturbances by staying those whom he shall see engaged therein from execut-

Popham 121.
3 H. 7. 1. 10.
Vide supra.

ing their purpose, and also by stopping others whom he shall see coming to join them; for if private persons may do thus much, as it is most certain that they may, towards the suppressing of a common affray, surely *a fortiori* they may do it towards the suppressing of a riot? Also it hath been holden, That private persons may arm themselves in order to suppress a riot; from whence it seems clearly to follow, that they may also make use of arms in the suppressing of it, if there be a necessity for their so doing. However it seems to be extremely hazardous for private persons to proceed to those extremities; and it seems no way safe for them to go so far in common cases, lest under the pretence of keeping the peace, they cause a more enormous breach of it, and therefore such violent methods seem only proper against such riots as favour of rebellion, for the suppressing whereof no remedies can be too sharp or severe.—However it is enacted by 1 Geo. 1. c. 5.

Popham 121.
Kelynge 76.

A person present aiding and abetting rioters is a principal in the second degree, under this act of parliament. 4 Burr. 3473.

Vide Douglas, 7 Co. n. 11, 12

“ That if more persons than twelve being unlawfully, riotously and tumultuously assembled, twelve or more of them shall continue together, and not disperse themselves within one hour after proclamation made in pursuance of that statute, that then every peace officer of the place where such assembly shall be, and all persons who shall be commanded to be assisting to such officer, may and ought to apprehend all such rioters, and carry them before some justice of peace; and that if any such rioter shall happen to be killed, maimed, or hurt by reason of their resisting such officer, &c. the officer shall be discharged, &c.” But the statute being wholly in the affirmative, cannot be thought to take away any part of the authority in the suppressing of a riot, which was before that time given either to officers or private persons by the common law or by statute.

Crompton 61.
Dalt. c. 46.
C. Car. 507

2 R. Abr. 202.

Sec. 12. Generally offences of this nature are punished at the common law, as trespasses, by fine and imprisonment only; yet sometimes, where they have been very enormous, they have been punished with the pillory; and anciently, if they were undertaken in contempt of the king's express prohibition of their meeting, under pain of forfeiture of lands, &c. they seem to have been punishable with such forfeiture.

21 Ed. 4. 13, 14.
Dalt. c. 88.

C. Car. 252.
2 Hale 155.

(5) Vide the King v. Kinner, Lord Mayor of London, during the riots in the year 1789.

Sec. 13. It hath been holden, That the persons of whom a corporation consists, being guilty of a riot, are punishable in their natural, but not in their politic capacity; for the corporation itself cannot be in fault, because it is invisible, and exists only in supposition of law. Yet there are some precedents by which it appears, that corporations have been amerced, (5) and their liberties seized into the king's hands, for suffering a dangerous riot to happen within their jurisdiction without using their endeavours to suppress it.

Sec. 14.

SECT. 14. Women are punishable as rioters, but infants under the age of discretion are not.

As to the third point, *viz.* How far offences of this nature may be suppressed and punished by statute; I shall consider, How far they may be suppressed and punished by one justice of peace. And, How far by two or more.

SECT. 15. As to the first of these points, it is enacted by 34 Edw. 3. c. 1. "That justices of peace shall have power to restrain offenders, rioters, and all barrators; and to pursue, arrest, take and chastise them according to their trespasss and offence; and to cause them to be imprisoned, and duly punished, &c."

SECT. 16. And this statute has been liberally construed for the advancement of justice; for it hath been resolved, That if a justice of peace find persons riotously assembled, he alone without staying for his companions hath not only power to arrest the offenders, and bind them to their good behaviour, or imprison them if they do not offer good bail, but that he may also authorise others to arrest them by a bare parol command without other warrant, and that by force thereof the persons so commanded, may pursue and arrest the offenders in his absence as well as presence. It is also said, That if a justice of peace be sick, and hear that persons are riotously assembled, he may send his servants to arrest them and bring them before him; and that if he hear that persons are riotously together in a certain place, and go thither and find none there, he may leave his servants behind him with a command to arrest them, when they shall come. Also it is said, That after a riot is over, any one justice of peace may send his warrant to arrest any person who was concerned in it, and also that he may send him to gaol, till he shall find sureties for his good behaviour.

14 H. 7. 9.

Lamb. 181, &c.

Dalt. c. 46.

B. Peace. 7.

Fulton 28.

Crom. 62, 63,

64, 65, 194.

Kellwood 41.

SECT. 17. But it seems to be agreed, that no one (a) justice of the peace hath any power by force of this statute, either to record a riot upon his own view, or to take an inquisition thereof after it is over. Also if one justice of peace proceeding upon this statute, shall arrest an innocent person as a rioter, it seemeth that he is liable to an action of trespass, and that the party arrested may justify the rescuing of himself, because no single justice of peace is by this statute made a judge of the said offence. (b) But if a riot shall be committed by persons armed in an unusual manner, contrary to the statute of *Northampton*, and any one justice of peace acting *ex officio*, in pursuance of the said statute, seize the armour and imprison the offender, and make a record of the whole matter, such a record cannot be traversed, because it is made by one acting in a judicial capacity, as appears more at large in the chapter

(a) B. Peace, 7.

Kellw. 47.

Lamb. 181, &c.

Fulton 26.

Summary 177.

Crom. 61, 63,

65.

Dalt. c. 46.

Com. B. Judges

(b) 3 Co. 121.

Dalt. c. 22, 46.

of affrays; and for the same reason, if a justice of peace proceeding on the statute of 15 Rich. 2. against forcible entries and detainers, shall upon his own view record a riot, which shall be committed in the making of any such forcible entry or detainer, a riot so recorded cannot be traversed, as hath been shewn in the foregoing chapter, Also if a justice of peace acting as a judge, by virtue of any statute whatsoever empowering him so to do, make a record upon his view of a riot committed in his presence, such record shall not be traversed; for the law gives such an uncontrollable credit to all matters of record, made by any judge of record as such, that it will never admit of an averment against the truth thereof.

Crompton 65.
Lambard 317.
Vide *inf.* f. 25.

Fult. 25, 26.
Lambard 314.
Crompton 62.

Sec. 18. It hath been questioned, Whether a justice of peace be authorized by virtue of the above-mentioned statute of 34 Edw. 3. c. 1. to raise the power of the county to suppress a riot; but it seemeth, That by being made a conservator of the peace, he hath by an implication of law, all such powers in relation thereto, as are incident to the office of a conservator of the peace by the common law; and consequently, That he hath a right of demanding the assistance of others to enable him to preserve the peace in the same manner, as every sheriff and constable are empowered to demand such assistance by the common law: However there seems to be no reason to doubt, but that every justice of peace is authorized by 17 Rich. 2. c. 8. to raise the power of the county to repress a riot; for by the said statute it is enacted, "That as soon as the sheriffs, and other the king's ministers," under which words all justices of peace seem clearly to be included, "shall hear of a riot, rout, or other assembly against the peace, they with the power of the county where such case shall happen, shall disturb such malice with all their power, and shall apprehend all such offenders, and put them in prison, until due execution of the law be made of them; and that the lords and other liege people of the realm shall attend, with their whole strength and power, the sheriffs and ministers aforesaid."

3 H. 7. 70.
3 Inst. 158.
Vide *supra*.

Sec. 19. As to the second point, *viz.* How far offences of this nature may be suppressed and punished by two or more justices of peace; it is enacted by 13 Hen. 4. c. 7. "That if any riot, assembly, or rout of people against the law, be made in parties of the realm, that the justices of peace, three or two of them at the least, and the sheriff or under-sheriff of the county where such riot, assembly or rout, shall be made hereafter, shall come with the power of the county (if need be) to arrest them, and shall arrest them; and the same justices and sheriff, or under-sheriff, shall have power to record that which they shall find so done in their presence against the law. And that by the record of the same justices and sheriff, or under-sheriff, such trespassers

"and

" and offenders shall be convicted in the manner and form as is contained in the statute of forcible entries."

Sec. 20. In the construction this statute, compared with the above-mentioned statute of 17 Rich. 2. c. 8. and also with the statute of 2 Hen. 5. c. 8. it hath been holden, That all persons whatsoever, and even noblemen, and all others of what condition or degree soever they may be, except women, clergymen, persons decrepit, and infants under the age of fifteen years, are bound under pain of fine and imprisonment, upon reasonable warning to attend the justices and sheriffs in the execution of the said statute, and not only to arrest the rioters, but also to conduct them to prison.

Pulton 29.
Dalt. c. 46.
Crom. 63.
Lamb. 116, 315.

Sec. 21. Also it hath been holden, That those who attend the justices in order to suppress a riot, may take with them such weapons as shall be necessary to enable them effectually to do it, and that they may justify the beating, wounding, and even the killing of such rioters as shall resist, or refuse to surrender themselves.

Pop. 120, 121.
Crompton 62.
Dalton c. 46.
Lambard 316.

Sec. 22. It is said, That the justices of peace are not only impowered by the said statute, to raise the power of the county to assist them, in suppressing a riot which shall happen within their own view or hearing, but also, that they may safely do it upon a credible information given them of a notorious riot happening at a distance, whether there were any such riot in truth or not; for it may be dangerous for them to stay till they can get certain information of the fact: But they seem to be punishable for alarming the country in this manner, without some such probable ground of their proceeding, as would induce a reasonable man to think it necessary and convenient.

Lamb. 385,
316, 318, 319.
Dalt. c. 46.
Pulton 29.
Crom. 64.

Sec. 23. It seems clear from the said statute, That if the justices, &c. in going towards the place where they have heard that there is a riot, shall meet persons coming from thence riotously arrayed, they may arrest them for being assembled together in such an unlawful manner, and also make a record thereof, &c. for the statute extends to all other unlawful assemblies whatsoever, as well as to riots.

Dalt. c. 46.
Lamb. 316.
Crom. 63.

Sec. 24. Also it seems clear, That after the justices have had a view of a riot they may make a record thereof, whether the offenders be in custody at the same time, or have escaped: And it is said that the justices may lawfully, upon a fresh pursuit, arrest such of the offenders as shall have escaped, but that they cannot at another time award any process on such a record, and therefore that they ought to send it into King's Bench, if any of the offenders escape from a fresh pursuit, and that process shall issue against them from thence: However there seems to be no doubt, but that any of the same justices who have recorded a riot, or any other justice of peace, may at any time by virtue

Lar. 318.
Dalt. c. 46.
Pulton 29.
8 C. 121.

Vid. Int. f. 29.
Vide sup. 15, 16.

of the abovementioned statute of 34 Edw. 3. c. 1. arrest those who have been notoriously guilty of a riot, in order to compel them to find sureties for their good behaviour.

Raymond 386.
Crom. 65. 63.
Dalton c. 46

Sec. 25. It seemeth to be certain, That the record of a riot expressly mentioned to have happened within the view of the justices by whom it is recorded, is a conviction of so great authority, that it can no way be traversed, however little ground in truth there might be to affirm that any riot at all was committed, or however innocent the parties may be of the fact recorded against them. And it is said, That if any one be bound by recognizance to keep the peace, and on a *seire facias* thereon such a record of a riot be produced against him, he shall not only be concluded thereby from pleading the general issue, but also from pleading any matter of justification whatsoever.

Pulton 29.
Lamb. 316, 31

Lambard 317.
Dalton c. 130.

Sec. 26. However it seemeth clear, That if in such a record of a riot it be contained, that the party was guilty therein of a felony, or maim, or rescous, the party shall be concluded thereby as to the riot only, and not as to any of the other matters, because the justices of peace, have by this statute, a judicial authority over no other offences except riots, routs, and unlawful assemblies.

Lambard 316.
Pulton c. 46.

Sec. 27. And inasmuch as such a record is a final conviction of the parties as to all such matters as are properly contained in it, it ought to be certain both as to the time and place of the offence, and the number of persons concerned therein, and the several kinds of weapons made use of by them, and all other circumstances of the fact; for since the parties are concluded from denying the truth of such a record, and have no other remedy to defend themselves against it, but only by taking advantage of the insufficiency of what is contained in it, they may justly demand the benefit of excepting to it, if it do not expressly shew, both that they are guilty within the meaning of the statute; and also how far they are guilty, and that the justices have pursued the power given them by the said statute, and from the same ground it seems also to follow, That such a record may be excepted against, if it do not appear to have been made by the sheriff or under-sheriff in concurrence with the justices.

Lambard 319.
Raymond 386.
Con. Dalton c. 46.

Lambard 317.
Dalton c. 46.

Sec. 28. It is said that the offenders being under the arrest of the said justices, and also convicted by a record of their offence, ought immediately to be committed to gaol by the same justices, till they shall make fine and ransom to the king, which can be assessed by no other justices of peace, except those by whom the record of the offence was made; and by 2 Hen. 5. c. 8. such fine ought to be larger than it was wont to be before that statute, for the support of the charges of the said justices, &c. whereof payment ought to

to made by the sheriff, by indenture thereof between him and them.

Stat. 29. It is farther enacted by the said statute of 13 Hen. 4. c. 7. that if it shall happen, "That such trespassers and offenders be departed before the coming of the said justices and sheriff, and under-sheriff, that the same justices, three, or two of them shall diligently inquire within a month after such riot, assembly, or rout of people so made, and thereof shall hear and determine according to the law of the land."

Stat. 30. Also it is farther enacted by 19 Hen. 7. c. 13. "That the sheriff having a precept directed to him to return a jury in pursuance of 13 Hen. 4. c. 7. shall return twenty-four persons dwelling within the shire where such riot, rout, or unlawful assembly shall be so committed and done, whereof every of them shall have lands and tenements within the same shire, to the yearly value of twenty shillings of charter-land or freehold, or twenty-six shillings and eight-pence of copyhold, or of both, over and above all charges, for to enquire of the said riot, rout, or unlawful assembly. And that he shall return upon every person so by him impanelled, in issues at the first day twenty shillings, and at the second day forty shillings, if they appear not, and be sworn to inquire of the premisses at the first day. And that the sheriff for every default, &c. shall forfeit twenty pounds, &c."

Stat. 31. It is not clearly settled, whether the month, within which the justices of peace are confined to take their inquiry by force of these statutes, must be reckoned according to the computation of a lunar, or solar month; however, it seems to be agreed, That if the justices give their charge to the jury, and it is said, that if they do but award a precept for the returning of the jury, within a lunar month, they may take the verdict afterwards, for the cause being regularly attached in them within the time prescribed by the statute, shall be prosecuted as all other cases ought, with such convenient dispatch as to the judges thereof shall seem proper; and the statute, by obliging the justices to make so speedy an enquiry, meant not to hurry them in the execution of it.

1 Sid. 186.
1 Keb. 695.
Vide supra.
Lamb. 322.
Dalt. c. 46.
Pulton 29.
6 Mod. 141.
Salkeld 593.

Stat. 32. It is generally said, That any justice of the county may take such an enquiry, whether they dwell near the place where the riot happened, or at a distance, or whether they went to view the riot or not; for the statute ought to be construed as largely as the words will bear, in favour of the justices power in the suppressing of such riots; and therefore those words in the statute, that the same justices, &c.

Lamb. 222, 227.
D. 46.
Pulton 29.
Crompt. 62, 63,
seems contrary.

this]

shall enquire, ought to be thus expounded, That the same justices who were before impowered to raise the *posse*, &c. shall inquire; and it is clear, That any justices in the county are within that part of the statute which gives that power; neither is it any way reasonable to construe the last clause of the said statute, whereby the justices who who dwell nighest, are bound to execute the statute under pain of one hundred pounds, in such a manner as to restrain the jurisdiction of those who by the foregoing part of the said statute are authorised to execute it; for if such an exposition should prevail, the negligence of the justices who happen to dwell nighest would make the statute wholly ineffectual.

See Sect. 44.

Lambard 321.
Raymond 386.
Salkeld 593.
Carthew 333.

Sect. 33. It seems clear from the wording of the above-mentioned clause, that the sberiff ought not to join with the justices in taking of such an inquiry, as he ought to do in making a record of a riot upon view.

Lamb. 323, 328.
Dalt. c. 46, &
c. 132.
Pulton 26
Crompton 67.

Sect. 34. Also it seems clear from these words in the statute of 13 Hen. 4. c. 7. "That the same justices shall hear and determine, &c." that they may award process under their own *teste*, against those who shall be indicted before them of any of the offences above-mentioned, according to the form of the said statute; and also that they may award the like process for the trial of a traverse of such an inquisition, and do all other things in relation thereunto, which are of course incident to all courts of record.

Dalt. c. 46.
Crompton 61

Sect. 35. But it hath been questioned, whether the justices can safely dismiss the offenders upon their paying such a fine as shall be imposed upon them, without some judgment for their imprisonment as well as fine, inasmuch as the statute of 2 Hen. 5. c. 8. is express, That all rioters attainted of great and heinous riots shall have one whole year's imprisonment at the least, without bail, &c. and that rioters attainted of petit riots, shall have imprisonment, as best shall seem to the king or to his council.

Crompton 63.
Pulton. 24.
Dalt. c. 46.
Sec 1. Loom. 232.

Sect. 36. Formerly, if the fine imposed upon rioters by justices of peace had been too favourable, it was a common practice for the court of Star-chamber afterwards to impose such other fine as might, together with that which was assessed by the justices of peace, be proportionable to the heinousness of the offence; and this was said not to be a double punishment for the same offence, but only an award of due penalty at several times.

Sect. 37. It is farther enacted by the said statute of 13 Hen. 4. c. 7. "That if the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, three, or two of them, and the sheriff, or under-sheriff, shall certify before the king and
" his

“ his council all the deed and the circumstances thereof:
 “ which certificate shall be of like force as the presentment
 “ of twelve men; upon which certificate the said trespassers
 “ and offenders shall be put to answer, and they which shall
 “ be found guilty, shall be punished according to the discre-
 “ tion of the king and his council. And if such trespassers
 “ and offenders do traverse the matter so certified, the same
 “ certificate and traverse shall be sent into the King’s Bench,
 “ there to be tried and determined, as the law requireth; and
 “ if they appear not before the king and his council, or in
 “ the King’s Bench, upon such process and proclamation for
 “ their appearance as are required by the said statute, they
 “ shall be attainted of the riot, &c.”

Sec. 38. And it is farther enacted by 19 Hen. 7. c. 13. That if a riot, &c. be not found by the jury by reason of any maintenance or embracery of the jurors, then the same justices, &c. over and above such certificate which they must and are bound to make by the said statute of 13 Hen. 4. c. 7. shall in the same certificate certify the names and misdemeanors of such maintainers, &c. on pain that every of the said justices, &c. shall forfeit twenty pounds, if they have no reasonable excuse for not certifying the same; which certificate so made shall be of like force as if the matter were found by verdict of twelve men; and every person “ duly proved to be such a maintainer, &c. shall forfeit “ twenty pounds, &c.”

Sec. 39. In the construction of these statutes it hath been holden, That the certificate required by the above mentioned statutes may be made, either by the justices, &c. who went to see the riot, or by those who took the inquiry; but it seems to be most proper, That wherever such an inquisition is taken, such certificate should be made by such justices who made the inquiry, because they having had the examination of the fact, must needs be best able to judge of the circumstances thereof, and in that respect are the most proper persons to supply the defects of the inquiry: However, the said statute of 19 Hen. 7. c. 13. which is grafted on 13 Hen. 4. c. 7. seems clearly to imply, That some justices are bound in a more especial manner to make such certificate than any others, by imposing the penalty of twenty pounds on those who neglect to make it as they are bound by 13 Hen. 4. c. 7. which part of the statute seems to be most reasonably applied to those justices who took the inquiry, or in case that no inquiry was taken, to those justices who endeavoured to take one, but by the fault of others were hindered from taking it; for there was no need of such an additional penalty on the neighbouring justices who were bound before to do their duty in executing 13 Hen. 4. c. 7.

Lamb. 323, 326.
 Pulton 29.
 Dalton 6. 46.

under pain of forfeiting one hundred pounds, as will be shewn, section forty four, &c.

Fulton 29.
Lambard 324.
Dalton c. 46.

Sec. 40. Also it is generally said, That such a certificate must be made within a month after the inquiry; and this seems to be a very reasonable construction where an inquiry has actually been made; but it may happen that no inquiry at all may be taken, either through the default of the sheriff in not returning a jury, or the obstinacy of the jurors in refusing to appear, or the rebellious humour of the people in not suffering the justices to do their duty; in all which cases a certificate seems to be required, both by the intent and letter of the statute, the words whereof as to this purpose are, "If the truth cannot be found in the manner as is aforesaid, then within a month then next following, the justices, &c. shall certify, &c." And therefore in these cases it seems proper to make a certificate of the obstructions, which prevented the taking of such an inquiry, within a month after they happen.

Lambard 324.
Com. Cl. 406. 62.
Dalton c. 46. &
107.
B. Praem. 1.

Sec. 41. It seemeth clear from the plain words of the statute, That the certificate ought to be made to the privy council board, which is clearly distinguished, both from the Chancery, and also from the King's Bench, which in some statutes relating to judicial proceedings, are taken for the king's council.

Fulton 29.
Crompton 62.
Lambard 324. 126.
Dalton c. 40.

Sec. 42. It is said, That if there be variance between the inquisition and certificate, that shall be taken which is most for the king's advantage; and therefore if the inquisition be of a riot by ten persons, and the certificate of a riot by twenty, or by ten in harness; or of a battery joined with a riot; that the certificate shall be preferred, because the fine to the king shall be the greater; but if they differ only as to the time, it is said that the inquisition shall be preferred.

Dalton c. 46.
& c. 120.
Lamb. 321, 322.

Sec. 43. Also it seemeth certain, That such a certificate, being in nature of an indictment at common law, ought to comprehend the certainty of time, place, and persons, and other material circumstances, both of the riots and maintenance, &c. but perhaps it need not express the additions of the offenders.

Sec. 44. It is farther enacted by the said statute of 13 Hen. 4. c. 7. "That the justices of peace dwelling nighest in every county where such riot, assembly, or rout of people shall be made hereafter, together with the sheriff or under-sheriff of the same county, and also the justices of assises, for the time that they shall be there in their session, in case that any such riot, assembly, or rout be made in their presence, shall do execution

execution of this statute, every one upon pain of one hundred pounds, to be paid to the king as often as they shall be found in default of the execution of the same statute."

Sec. 45. In the construction of this clause the following opinions have been holden: First, That no justice of peace is in danger of incurring the penalty thereof, unless he dwell in the county wherein a riot happens.

Lambard 236.
Crompton 63.
Dalton c. 46.

Sec. 46. Secondly, That if any justices of peace, who do not dwell nearest to the place, do actually execute the statute, they excuse all the rest.

Dalton c. 46.
Lambard 326.
Crompton 63.

Sec. 47. Thirdly, That if the justices whose dwelling was nearest at the time of the riot, or one of them, happen to die within the month, those whose dwelling is thereby become the nearest are bound to execute the statute in the same manner as the others were.

Pulton 30.
Crompton 63.

Sec. 48. Fourthly, That notwithstanding those justices only, who dwell nearest, are liable to the penalty of the statute, yet if any others on notice neglect to supply their default, they are finable at discretion.

Lambard 327.
Dalton c. 46.
Pulton 30.

Sec. 49. Fifthly, That if the two justices, or one of them, do their duty in executing, or endeavouring to execute the statute, they shall not incur any penalty through a default of the sheriff, &c. either in refusing to appear, or to return a jury, &c.

Crompton 63.
Lambard 327.
Dalton c. 46.
Pulton 30.

Sec. 50. Sixthly, That the said justices, &c. shall not avoid the penalty by executing the statute in part only, as by recording a riot without committing the parties.

Crompton 61.

Sec. 51. Seventhly, That no justice, &c. is subject to the penalty of the said statute on account of a petit riot, but only of such as are notorious, and in nature of insurrections and rebellions.

Dalton, c. 46.

Sec. 52. Eighthly, That if a justice of peace, &c. had no express notice given him of the riot, he shall be excused, unless it were so very flagrant, that by common intendment, every one dwelling near it could not but have notice thereof.

Dyer 210.
Lambard 327.
Pulton 28.
Crompton 62.
Dalton c. 46.

Sec. 53. Ninthly, That the acquiescence or agreement of the parties aggrieved is no excuse to the justices, because they ought, *ex officio*, to make the inquiry, and make proclamation whether any will give evidence for the king, &c. and may bind such of the parties grieved, as shall refuse to prosecute their complaint, to their good behaviour.

Crompton 62.
Lambard 322.
Pulton 28.
Dalton c. 46.
Crompton 64.

Stat. 54. Also it is farther enacted by 2 Hen. 5. c. 8. "That upon any default of the said justices, &c. touching the execution of 13 Hen. 4. a commission shall be awarded at the instance of the party grieved, to enquire as well of the truth of the case, as of the default of the said justices, &c. and that the said commissioners shall presently return into Chancery the inquests before them taken; and that the jurors, who shall make inquiry, shall be worth 10*l.* *per annum*, and shall be returned by the coroners, if the sheriff, supposed to be in default, continue in his office, &c." See the statute.

Stat. 55. And it is farther enacted by 2 Hen. 5. c. 9. and 8 Hen. 6. c. 14. "That the lord chancellor, upon complaint made to him, that a dangerous rioter is fled into places unknown, and also upon a suggestion under the seals of two justices of peace and the sheriff, that the common fame and voice runneth in the county of the riot, may award a *capias* against the party, returnable in Chancery, upon a certain day, &c. and afterwards a *writ of proclamation* returnable in the King's Bench, &c."

Stat. 56. But all the penalties of the above-mentioned statutes having been found by experience not to be sufficient to restrain the rage of the populace from breaking out into dangerous tumults, whenever they happen to be persuaded that they lie under any real or pretended grievance, it was thought necessary to make a farther provision against such insolent disturbances of the peace, by more severe laws; and to this end it was enacted by 1 Geo. 1. c. 5.—
 "That if any persons to the number of twelve, (5) or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any justice of peace, sheriff of the county, or under-sheriff, or by the mayor, bailiff or bailiffs, or other head-officer or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, under the pains of the said statute, shall afterwards unlawfully, riotously, and tumultuously continue together by the space of one hour after such proclamation made, or after a wilful let or hindrance of a justice of peace, &c. from making the same proclamation, shall be adjudged felons without benefit of clergy, &c."

4 Burr. 2073.
 (5) It is not perfectly clear from the penning of the act, whether it is necessary that there should have been twelve or more rioters in order to entitle the party injured to his action against the hundred. (Vide *loc. cit.* 59.) But, according to the most obvious construction, that number is not necessary to constitute the felony created by section 4. Douglas 700.

Stat. 57. And it is farther enacted by the said statute, "That if any person or persons, shall with force and arms
" wilfully

“ wilfully and knowingly oppose, obstruct, or in any manner
 “ wilfully and knowingly let, hinder, or hurt any person, &c.
 “ who shall begin to proclaim, or go to proclaim, according
 “ to the proclamation appointed by the said statute, whereby
 “ such proclamation shall not be made, they shall be adjudged
 “ felons without benefit of clergy.”

§ 58. And it is farther enacted by the said statute,
 “ That if any persons unlawfully, riotously and tumultuously
 “ assembled together, to the disturbance of the public peace,
 “ shall unlawfully and with force demolish or pull down, or
 “ begin to demolish or pull down any church or chapel, or
 “ any building for religious worship, certified and registered
 “ according to 1 Will. & Mar. c. 18.” which is commonly
 called The Toleration Act, “ or any dwelling-house, barn,
 “ stable, or other out-house, they shall be adjudged felons with-
 “ out benefit of clergy.”

N. B. Vide the
 trials of the riot-
 ers, in the year
 1780.

§ 59. And it is farther enacted by the said statute, ^{Vide Com. 2-1}
 “ That whenever any such church, &c. shall be demolished, ^{485.}
 “ &c. by any such rioters, &c. the inhabitants of the
 “ town or hundred wherein the riot happened, shall be
 “ bound to make good the damage, &c.”

† § 60. And it is recited by 9 Geo. 3. c. 29. “ That
 “ whereas some doubts have arisen whether the said act of 1 Geo. ^{For the persons}
 “ 1. s. 2. c. 5. extends to the pulling down and demolishing ^{destruction of}
 “ of mills,” thereupon it is enacted, “ That if any person or ^{houses, trees,}
 “ persons, unlawfully, riotously, and tumultuously assembled ^{&c. vide 6 Geo.}
 “ together, to the disturbance of the public peace, shall un- ^{1. c. 16. ante.}
 “ lawfully, and with force demolish, or pull down, or begin ^{p. 215.}
 “ to demolish or pull down any wind saw-mill, or other wind-
 “ mill, or any water-mill, or other mill, which shall have been
 “ or shall be erected, or any of the works thereto respectively
 “ belonging; such offender shall suffer death without clergy;”
 provided the prosecution be commenced within eighteen
 months after the offence committed.

† § 61. It is enacted by 13 Car. 2. c. 5. “ That no
 “ person or persons whatsoever, shall solicit, labour, or pro- ^{Nov 101.}
 “ cure, the getting of hands, or other consent of any per- ^{2 Crick 37.}
 “ sons above the number of twenty, to any petition, com- ^{Moor 755.}
 “ plaint, remonstrance, declaration, or other address to the ^{4 Comm. 147.}
 “ king, or both, or either houses of parliament, for altera-
 “ tion of matters established by law in church or state,
 “ unless the matter thereof have been first consented unto, and
 “ ordered by three or more justices of that county, or by the
 “ major part of the grand jury of the county, or division
 “ of

“ of the county, where the same matter shall arise at their public assizes, or general quarter sessions, or if arising in London, by the lord mayor, aldermen, and common council assembled; and that no person or persons whatsoever, shall repair to his majesty, or both, or either the houses of parliament upon pretence of delivering any petition, complaint, remonstrance, or declaration, or other addresses accompanied with excessive number of people, nor at any one time with above the number of ten people upon pain of incurring a penalty not exceeding one hundred pounds and three months imprisonment, on conviction, by two witnesses, within six months, at the King’s Bench assizes, or quarter sessions. But this act shall not prevent the presentation of any public or private grievance, to any member of parliament, by any number not exceeding twenty, or to the king, for any remedy to be had thereupon.” (6)

(6) N. B. By 1 Will. and Mary, sess. 2. c. 2. s. 1. article 5, usually styled the Bill of Rights, it is enacted, “ That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal.” On the trial of Lord George Gordon, it was contended that this article had virtually repealed the above statute of Charles; but Lord Mansfield declared it was the unanimous opinion of the court, that neither that, nor any other act of parliament had repealed it; and that it was in full force. Douglas 592, 593.

CHAPTER THE SIXTY-SIXTH:

OF OFFENCES BY OFFICERS IN GENERAL.

OFFENCES under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, are either; Such as are committed by officers; Or, Such as are committed by common persons without any relation to an office.

Offences by officers seems : ducible to the following heads; First, Neglect, or breach of duty. Secondly, Bribery, Thirdly, Extortion.

Co. Litt. 235, 237. *Sess. 1.* As to the first of these offences, I take it to be agreed, That in the grant of every office whatsoever, there is this condition implied by common reason, that the grantee ought to execute it diligently and faithfully: For since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just, than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it. And

Vide the case of the King v. Bam-bridge, Mich. term, 1, Geo. 3. for an information for misadministration, as accounts and other process, White v. D

And therefore it is certain, That an officer is liable to a forfeiture of his office, not only for doing a thing directly contrary to the design of it, but also for neglecting to attend his duty at all usual, proper, and convenient times and places, whereby any damage shall accrue to those, by or for whom he was made an officer. And some have gone so far as to hold, That an office concerning the administration of justice, or the common-wealth, shall be forfeited for a bare non-user, whether any special damage be occasioned thereby or not: But this opinion doth not appear to be warranted by any resolution in point, and the (a) authorities which are cited to maintain it, do not seem to come up to it. However it cannot but be very reasonable, That he who so far neglects a publick office, as plainly to appear to take no manner of care of it, should rather be immediately displaced, than the publick be in danger of suffering that damage, which cannot but be expected some time or other from his negligence.

9 Co. 50.
Co. Lit. 213.
Roll. 153, 156
2 And. 119.
Hard. 130.
M. den 153.
1 Sid. 81.
C. Cat. 491.

(a) 30 H. 6. 32
20 E. 4. 5.
22 Ill. 54.
2 H. 7. 11.
Pl. den 379.
L. Quin.
Ed. 7. 27.
11 Ed. 4. 1.

Sec. 2. But it would be endless to enumerate all the particular instances, wherein an officer may be discharged or fined; and it also seems needless to endeavour it, because they are generally so obvious to common sense, as to need no explication; for what can be more plain, than that a gaoler deserves to be discharged and fined, for (b) voluntarily suffering his prisoners to escape, or for (c) barbarously mistreating them? What can be more evident, than that a (d) sheriff is justly punishable for persuading a jury to underprize goods in the execution of a *juri facies*, &c. And therefore I shall leave the particular cases of this nature to every man's own judgment, which from the consideration of the general rules above-mentioned, and the various circumstances of every case, will easily discern how far each offence of this kind deserves to be punished.

Co. 50.
(c) Ra. m. 216
1 Ed. 4. 20

CHAPTER THE SIXTY-SEVENTH.

OF BRIBERY.

IN treating of bribery, I shall consider, What it is. And How it is punishable.

Sec. 1. And first, Bribery in a strict sense is taken for a great misprision of one in a judicial place, taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for

doing his office, or by colour of his office, but of the king only.

3 Inst. 149.
Hobart 9.
C. Jac. 65.
1 L. vinz 40.
3 Modern 26.
2 Salk 1d 605.
11 Modern 193.

Sect. 2. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of publick justice in order to incline him to do a thing against the known rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing a thing which deserves the severest of punishments. (1)

(1) Therefore, to bribe persons, either by giving money, or promises to vote at elections of members of corporations, which are elected for the sake of public government, is an offence for which an information will lie. 2 Ld. Ray. 1377. 1 Black. 383. But the court will grant an information for this offence very cautiously, since the additional penalties by statute. 1 Black. 38c. *Infra.* sect. 7.

3 Inst. 1;

Sect. 3. Also bribery sometimes signifies the taking or giving of a reward for offices of a public nature; and surely nothing can be more palpably prejudicial to the good of the publick, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of not to those who are most able to execute them, but those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry and diligence have qualified themselves for them, conferred on such who have no other recommendation but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expence they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectation.

Vide Nov 10c.
Mod 751.

For which reasons, among many others, it is expressly enacted by 12 Rich. 2. c. 2. "That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justice of the one bench and of the other, barons of the Exchequer, and all other that shall be called to ordain, name, or make justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers, for any gift, or brokerage, favour or affection, nor that none which sueth by himself, or by others, privily or openly,

“ openly, to be in any manner of office, shall be put in
 “ the same office, or in any other, but that they make all
 “ such officers and ministers, of the best and most lawful
 “ men, and sufficient to their estimation and knowledge.”

Also by 4 Hen. 4. c. 5. “ No Sheriff shall let his baili-
 “ wick to farm to any man, for the time that he occupieth
 “ such office, &c.”

Also it is enacted by 5 & 6 Edw. 6. c. 16. “ That if any
 “ person shall bargain or sell, or take any reward, or promise
 “ of any reward for any office, or the deputation of any office,
 “ any way concerning the king’s revenue, or the keeping of his
 “ castles, or the administration or execution of justice, (unless
 “ it be such an office as had been usually granted before the
 “ making of the said act by the justices of the King’s Bench
 “ or Common Pleas, or by justices of assize) that then every
 “ such person so bargaining or selling, or taking such reward,
 “ or promise, &c. shall not only forfeit his right to such office,
 “ or to the nomination thereof, but also every person who
 “ shall give any such reward or promise, &c. shall be adjudged
 “ a disabled person in law, to have or enjoy such office, &c.”

Vide Noy 102.
 Moor. 781.

Sec. 4. In the construction of this statute of 5 & 6 Edw. 6.
 the following points have been resolved: First, That the offices
 of chancellor, register, and commissary in ecclesiastical courts,
 are within the meaning of the statute, inasmuch as those courts,
 do not only determine matters which are brought before them,
 merely *pro salute animæ*, but also have the decision of disputes
 concerning the lawfulness of matrimony and legitimation of
 children, which touch the inheritance of the subjects, and
 also hold plea of legacies and tithes, &c. in which respects
 they are courts of justice; but it hath been adjudged, that no
 office in fee is within the statute.

C. Jac. 269.
 3 Inst. 148.
 Salkeld. 468.
 2 Levinz 289.
 2 Ven. 187. 467.

Sec. 5. Secondly, That one, who makes a contract for
 an office contrary to the purport of the said statute, is so far
 disabled to hold the same, that he cannot at any time during
 his life be restored to a capacity of holding it by any grant
 or dispensation whatsoever.

2 Levinz 151.
 Hobart 75.
 Co. Lit. 234.
 C. Car. 361.
 C. Jac. 386.

Thirdly, That a bond by a deputy of an office to pay a
 certain sum at all events, is within the statute, and consequently
 totally void, though it also contain other conditions which,
 if they stood by themselves would be good; but not a bond
 to pay half the profits or a certain sum out of the profits of the
 office for a deputation.

Salk. 466, 468.
 6 Mod. 234.
 3 Co. 32.
 C. Eliz. 529.
 530.
 1 And. 107, 150.

Fourthly, That the statute extends not to offices in the
 Plantations.

Salkeld 411.
 Quære 2 Mo.

Sec.

3 Inst. 145.
1 Hale 272.
1 L. Rep. 205.
C. J. 65.
1 Rush. Coll. 31.

Sec. 6. As to the second point, viz. How bribery is punishable; it is said, That at common law, bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason before the 25 Edw. 3. and at this day it is certainly a very high offence, and punishable, not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment, &c.

3 Inst. 148.
(2) This was the case of the Earl of Macclesfield, who had been raised by Buckingham's interest from the rank of a London merchant, to be lord high treasurer of England, but having incurred the displeasure of his patron, the favourite sought revenge, and employed all his credit with the commons to procure the impeachment of the treasurer; but the charge against him were neither numerous nor important, the whole measure very dissatisfactory to the king, and the fine was remitted upon the accession of Charles the first. Parl. Hist. vol. 6. p. 191.

Sec. 7. Also all the other above-mentioned kinds of bribery, taken in a large sense, seem to be punishable with fine and imprisonment, &c. And in the time of king James the First, the earl of M. lord high treasurer of England, being impeached by the commons for refusing to hear petitions referred to him by the king, till he had received great bribes, and for other such like misdemeanours was, by sentence of the lords, deprived of all his offices, and disabled to have any for the future, or to sit in the parliament, and was fined fifty thousand pounds, and imprisoned during the king's pleasure. (2)

AN ATTEMPT to induce a man to advise the king, under the influence of a bribe, is criminal, though never carried into execution. 4 Burr. 2469. Offering money to a privy counsellor to procure the reversion of an office in the gift of the crown, has been adjudged a misdemeanour, and punishable by information. Rex v. Vaughan.

+ *Sec. 8.* And it is enacted by 7 & 8 Will. 3. c. 7. (1) But this appears to be a voided clause, in action for this penalty is not maintained. L. Kay. 901.
“ That all contracts, promises, bonds, and securities whatsoever, made or given to procure any return of any member to serve in parliament, or thing relating thereunto, shall be adjudged void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit 300l. One third to the king; one third to the poor; one third to the informer; to be recovered by action or information.” (3)

+ *Sec. 9.* And it is further enacted by 2 Geo. 2. c. 24. 3 Burr. 1270.
“ That if any person having, or claiming a right to vote at any election for members of parliament, shall assist, receive, or take any money, or other reward by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election, or if any person by himself,

“himself, or any person employed by him, doth or shall by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure any person or persons, to give his or their vote or votes, or to forbear (a) to give his or their votes in any such election, such offender shall for every offence, forfeit 500 l. together with full costs of suit, by action or information at Westminster. And any person offending in any of the said cases, from and after judgment has been so obtained against him, or by summary action, or prosecution, or being any otherwise lawfully convicted thereof, shall be for ever disabled to vote in any election for members of parliament, or to hold, exercise, or enjoy any office, or franchise as a member of any city, borough, town corporate, or cinque port, as if he was dead.”

(a) It is not necessary that the party should actually forbear in consequence of their procurement. 3 Will. 292.

Sec. 10. But it is further enacted, “That if such offender, within twelve months next after such election, discover any other offender so that he be thereupon convicted, such offender so discovering and not having been before that time convicted of any offence against this act, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any offence against this act. Provided the prosecutions be commenced within two years, which commencement shall be (by 9 Geo. 2. c. 38.) the actual arrest, summons, or service of process.” (4)

(4) This statute does not take away the common law process by indictment, or information for bribery at elections for members of parliament. But, as the offender would be equally liable to the penalties of the statute, vide 1 Black. 524, the court will not grant an information until the two years are expired, 3 Burr. 1335, except in particular cases, founded on particular reasons. 3 Burr. 1340. And it seems as if the court would adjourn passing sentence on a conviction by indictment, on the defendant's entering into a recognizance to appear on the day when the time limited for bringing the *qui tam* action will expire, 3 Burr. 1359; but the court will not, after that time has elapsed, prolong the judgment on account of the defendant's having indicted one of the witnesses, upon whose testimony he was convicted, because being so much interested he could not be admitted a witness. 3 Burr. 1388. 1 Black. 304. Nor will they stay the judgment on the posture in an action for this injury, on affidavits that the defendant is a discoverer. 3 Willon 35. Nor will they grant a new trial, because a witness was *particeps criminis*. Sayer 290. But they will grant a new trial, if upon a special case, the jury have not found who was the first discoverer, although they find that the defendant produced a judgment by which it appeared that he had obtained a verdict against a third person upon this act; for it does not follow conclusively, that the person who obtains the verdict is necessarily the discoverer. 4 Burr. 2504, 2469. And it has been determined, that the person who makes an affidavit of the fact upon which another obtains a verdict, is the true discoverer. 4 Burr. 2286. And although a verdict is not a conviction until it be completed by a judgment, yet, after it is so completed, which the court will grant leave to do, it will relate back to the time of the original discovery. *Ibid.* 1 Black. 665. Vide also the *Clicklade* case, one volume, octavo, published by E. Brooke, 1785. Also 22 Geo. 3. c. 31.

If the elector is bribed by a friend of the candidate's, and exchanges a note to influence the vote, it is bribery within the act, although the elector voted for the opposite party. 3 Burr. 1275. 1 Black. 317. And so also is laying a wager with the voter that he does not vote for a particular candidate. *Loft.* 552. vide also *Allen v. Hume*, Mich. 26 Geo. 3. And by giving the elector money, he admits his right to vote, and shall not be permitted afterwards to controvert it. 3 Burr. 1500. Nor is it necessary that the candidate should have declared himself at the time the bribe was given, because asking a vote for him, under the title of the candidate's friend, makes him a candidate. *Combs v. Pitt*, 5 Geo. 3. 1 Black. 525. Nor is it necessary that the person bribed should actually have a right

right to vote. 3 Will. 35. But in an action the declaration must state *what* the defendant received or took as a reward, and whether money, or what particular species of reward, and not indefinitely and disjunctively, "that he took a gift or reward," and being upon a criminal charge, this defect is not healed by verdict, 4 Burr. 2471.

CHAPTER THE SIXTY-EIGHTH.

OF EXTORTION.

IN treating of Extortion, I shall consider, What shall be called Extortion; How it shall be punished.

Co. Lit. 368.
10 Coke 102.
3 Inst. 149.
C. Car. 43^d,
448.
Hutton 53.
3 Inst. 68.
1 Ray 149.

Sec. As to the first point it is said, That extortion in a large sense signifies any oppression under colour of right; but that in a strict sense, it signifies the taking of money by any officer, by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

11 Mod. 80, 137. Salkeld 382.

2 Inst. 209.
Co. Lit. 368.

Sec. 2. It is said, That at the common law, which was affirmed by the statute of Westminster, 1. c. 26. it was extortion for any sheriff or other minister of the king, whose office did any way concern the administration or execution of justice, or the common good of the subject, to take any reward whatsoever for doing his office, except what he received from the king. And surely this was a most excellent institution, highly tending to promote the honour of the king, and the ease of the people, and hath been always thought to conduce so much to the public good, that all prescriptions whatsoever which have been contrary to it, have been holden to be void; and upon this ground it hath been resolved, That the prescription, by virtue whereof the clerk of the market claimed certain fees for the view and examination of all weights and measures, &c. was merely void.

4th Ed. 3, 4, 5.
2 R. Abr. 266.
Cro. Cir. 250.

4 Inst. 274.
Moot 523.
2 Inst. 209.

21 H. 7. 17.
2 Inst. 210.
2 Inst. 176.
S. P. C. 49.

Sec. 3. But it hath been holden, That the fee of twenty pence, commonly called the bar-fee, which hath been taken, time out of mind, by the sheriff, of every prisoner who is acquitted, and also the fee of one penny, which was claimed by the coroner of every visne, when he came before the justices in Eyre, are not within the meaning of the statute, because they are not demanded by the sheriff or coroner for doing any thing relating to their offices, but claimed as perquisites of right belonging to them, whether they do any thing or not. But there seemeth to be no necessity for this distinction, for it cannot be intended to be the meaning of the statute to restrain

strain the courts of justice in whose integrity the law always ^{21 H. 7. 17.} ^{Co. Lit. 368.} reposes the highest confidence, from allowing reasonable fees for the labour and attendance of their officers. For the chief danger of oppression is from officers being left at their liberty to set their own rates on their labour, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts which will not suffer them to be exceeded, without the highest resentment. (1)

(1) For the fees allowed to the several officers, vide 3 Com. Dig. 323, 324. 1 Modern 5. 11 Modern 89. Ld. Ray. 4. 103. 9 and 10 Will. 3. c. 41. 29 Eliz. c. 4. 3 Jac. 1. c. 7. 10 & 11 Will. 3. c. 23. f. 8. 3 Geo. 1. c. 15. 17 Geo. 3. c. 26. f. 6. Cro. Cir. 253.

Sett. 4: Also it having been found by experience, That generally it is vain to expect that any officers who depend upon a known fixed salary, without having any immediate benefit from any particular instances of their duty, should be so ready in undertaking, or diligent in executing them, as they would be, if they were to have a present advantage from them; it hath been thought expedient to permit them to take certain fees in many cases, but it is certain that they are guilty of extortion, if they take any thing more. Also it hath been resolved, That a promise to pay them money for the doing of a thing which the law will not suffer them to take any thing for, is merely void, however freely and voluntarily it may appear to have been made; for if once it should be allowed, That such promises could maintain an action, the people would quickly be given to understand how kindly they would be taken, and happy would that man be who could have his business well done without them. (2)

3 Inst. 149.
2 Inst. 210.
Co. Lit. 368.
1 R. Abr. 6, 26,
41.
1 Roll. 513.
Noy 76.
1 Jones 65.
C. Eliz. 654.
Murr. 468, 523.
C. Jac. 103.

(2) It is extortion to oblige an executor to prove a will in the bishop's court, and to take fees thereon, knowing the same to have been proved in the prerogative court. Strange 73. Or in a sheriff's officer to admit a prisoner to bail, upon an agreement to receive a certain sum, when the prisoner should pay to a third person another sum of money. 2 Burr. 924. To arrest a man in order to obtain a release from him. 8 Mod. 189. In a gaoler to obtain money from his prisoner by any colourable means. 8 Mod. 226. Str. 575. Or in a church warden *colore officii*. 1 Sid. 307. In a miller, if he takes more for toll than is due by custom. Ld. Ray. 149. Or a commissary for absolution. 3 Leo. 268. Or a ferryman more for his ferry. 4 Mod. 101. Or to seize upon the place where a fair is held; and by building stalls, to force an exorbitant price for them. Ld. Ray. 150. Or in an under sheriff to refuse to execute process till his fees are paid. Salk. 335. Or to take a bond for his fee before execution is sued out. Hutt. 53. Or for a coroner to retrieve his view until his fees be paid. 3 Inst. 149.

Sett. 5. As to the second point, *viz.* How extortion shall be punished; there is no doubt, but that at common law it is severely punishable at the king's suit, by fine and imprisonment; and also by a removal from the office, in the execution whereof it was committed. Also extortion in sheriffs, escheators, bailiffs, gaoler, the king's clerk of the market, and other inferior ministers and officers of the king, whose offices do

11 Mod. 82.
2 R. Abr. 32.
33. 75.
Raym. 315.
2 Inst. 209.
3 Leo. 268.
3 Edw. 1. c. 26.
1 Strange 74.

do any way concern the administration or execution of justice, or the common good of the subject, or for the king's service, hath a farther additional punishment by the above-mentioned statute of Westminster, by which it is enacted, "That no sheriff, nor other king's officer, shall take any reward to do his office, but shall be paid of that which they take of the king; and that he who so doth, shall yield twice as much, and shall be punished at the king's pleasure." (3)

(3) And an action lies to recover the double value. 3 Com. Dig. 323. But the indictment which may be brought at the King's Bench, or information, must state the fact particularly. 3 Leo. 268. 25 Edw. 3. st. 3. c. 9. 11 Mod. 80. It must also specify the time when the offence was committed. 4 Mod. 101, 103. But although it be omitted to be stated for what the thing extorted was taken, yet it is good after verdict. Sid 91. And, in general, the King's Bench will oblige the party to demur to a defective indictment for extortion. 5 Mod. 13. And whatever may be the sum, if there is proof only of a shilling taken, the defendant is guilty; for the taking is the offence, and not the contract. L. Ry. 149. And he also who assists is equally guilty, for there are no accessories in extortion. Str. 73. Extortion may be laid in any county, by the 31 Eliz. c. 5. See vide 2 Hawkins, ch. 26. s. 30.

CHAPTER THE SIXTY-NINTH.

OF PERJURY.

OFFENCES under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, which may be committed by private persons, without any relation to an office; are either, Such as are infamous, and grossly scandalous, proceeding from principles of downright dishonesty, malice or faction. Or, Such as are of an inferior nature, and neither infamous, nor grossly scandalous.

Those of the first kind seem to be reducible to the following heads: Perjury, and subornation of perjury. Forgery. Cheats. Conspiracy. Keeping of a bawdy-house. And Libels.

And first of perjury, and subornation of perjury, of both which there are two kinds. First, By the common law. Secondly, By statute.

1. Dig. tit.
1. of Peace.
B.

PERJURY, by the common law, seemeth to be a wilful false oath, by one who being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.

For the better understanding whereof, I shall consider the following particulars:

First, How far this offence must be wilful. Secondly, In what kind of proceedings it may be committed. Thirdly, In what cases an oath may be said to be so far lawfully administered, that he who takes it may become guilty of perjury. Fourthly, In what kind of oaths perjury may be committed. Fifthly, How far the oath must be false. Sixthly, Whether the matter of the oath must be absolute. Seventhly, How far things sworn ought to be material to the point in question. Eighthly, How far the false oath must be credited.

SECT. 2. As to the first particular, *viz.* How far this offence must be wilful; it seemeth that no one ought to be found guilty thereof without clear proof, That the false oath alleged against him was taken with some degree of deliberation; for if upon the whole circumstances of the case it shall appear probable, That it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprize, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable.

SECT. 3. As to the second particular, *viz.* In what kind of proceedings this offence may be committed. It seems to be clearly agreed, That all such false oaths, as are taken before those who are any ways interested with the administration of public justice, in relation to any matter before them in debate, are properly perjuries; and it seems to have been holden by some, that all such false oaths as are taken before persons authorized by the king to examine witnesses in relation to any matter whatsoever, wherein his honour or interest are concerned, are also punishable as perjuries. And surely there can be no offence of this nature which will not justly deserve a public prosecution, inasmuch as if it should once prevail, it would make it impossible to have any law whatsoever duly executed, and expose the lives, liberties, and properties, of the most innocent, to the mercy of the greatest villains. And therefore it hath been holden, That not only such persons are indictable for perjury, who take a false oath in a court of record, upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of (a) equity, or spiritual (b) court, or any other (c) lawful court, whether the proceedings therein be of record or not (d) or whether they concern the interest of the king

(b) C. Eliz. 185, 609. 2 Roll. 419. 1 R. Abr. 40. 1 Leon. 131. Con. Dv. 245. (c) 2 R. Abr. 257. 1 R. Abr. 41. Winch. 3. 5 Mod. 348. Hutt. 31. 1 Mod. 55. Yelv. 27. C. Eliz. 297, 342, 348, 905. (d) 12 Co. 101. C. Jac. 212. Con. C. Jac. 120. 3 Inst. 164. Vice lect. 18.

5 Mod. 343.
10 Mod. 195.
Salkeld 515.
3 Inst. 163.

C. Eliz. 169.
100.

Nov. 123.
2 R. Abr. 257.
Hobart 12.

12 C. Eliz. 907.
Skinner 32.
1 Sid. 419.
1 R. Abr. 40.
5 Mod. 348.

(e) 1 R. Abr. 39.

or subject. And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorized by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and (e) therefore, That a false oath before a sheriff, upon a writ of enquiry of damages, is as much punishable as if it were taken before the court on a trial of the cause.

(f) C. Car. 146.

Also it seemeth, That any false oath is punishable, as perjury, which tends to mislead the court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause; as where a (f) person who offers himself to be bail for another knowingly, and wilfully swears that his substance is greater than it is. Also it hath been resolved, That not only such oaths as are taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice, are properly perjuries; as where one (g) takes a false oath before a justice of peace, in order to induce him to compel another to find sureties for the peace, &c. or where a person forswears himself (h) before commissioners appointed by the king to enquire of the forfeitures of his tenants estates, &c. whereby he makes them liable to be seized by exchequer process.—Also it hath been said, That a false oath is punishable as perjury, in some cases, wherein the king's honour or interest is concerned, though it do not concern the administration of justice; as where one swears a false oath concerning the possession of lands, before commissioners appointed by the king to inquire of such persons whose titles to the lands in their possession are defective, and want the supply of the king's patents: And this is certainly an offence of a very heinous nature, (i) tending not only to frustrate the king's gracious purpose, but to abuse his goodness by inducing him to grant his patents to those who are out of possession, and no way within the intent of the commission, which, instead of quieting the possessions of the subjects, cannot but end in the greatest disturbance of them.

(i) Hobart 62.

Con. 1 Ven. 369.
370.

3 R. Abr. 257.

However it seemeth certain, That no oath whatsoever in a mere private matter, howsoever wilful or malicious it may be, is punishable as perjury in a criminal prosecution; for private injuries are left to be redressed by private actions; and upon this ground it hath been holden, That a false oath taken by one upon the making of a bargain, that the thing sold is his own, is not punishable as perjury.—Also from what hath been said it appears, That the notion of perjury is confined to such publick acts only as affirm or deny some matter of fact, contrary to the knowledge of the party; and therefore, That it doth not extend to any promissory oaths whatsoever; from which it clearly

clearly follows, That no officer publick or private, who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury, in respect of such oath; yet it is certain, That his offence is highly aggravated by being contrary to his oath, and therefore, that he is liable to the severer fine on that account.

Sec. 4. As to the third particular, viz. In what cases an oath may be said to be so far lawfully administered, that he who takes it may become guilty of perjury by swearing falsely. It seemeth clear, That no oath whatsoever taken before (a) persons acting merely in a private (b) capacity, or (c) before those who take upon them to administer oaths of a publick nature, without legal authority for their so doing, or (d) before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even (e) before those who take upon them to administer justice by virtue of an authority seemingly colourable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle. (1)

affidavit in any extrajudicial matter. *Vide* 15 Geo. 3. c. 39. § 3 Barn. 444.

And from the same ground it seemeth also clearly to follow, That no false oath in an affidavit, made before persons falsely pretending to be authorized by a court of justice to take affidavits in relation to matters depending before such court, can properly be called perjury, because no affidavit, is any way regarded, unless it be made before persons legally intrusted with a power to take it, as being both of sufficient ability to ask all proper questions of the party, who shall make such affidavit, and also of such integrity as not to suffer any thing to be interred therein, to the truth whereof the party hath not sworn. And though it may be said, That an affidavit taken before persons falsely pretending to be commissioned for such purpose by the courts of justice, doth directly tend to impose upon such courts, and may possibly happen through surprize to be read, and may also in its own nature be altogether heinous, as if it had been made before persons regularly impowered to take it, yet inasmuch as it is of itself of no manner of validity, and is no otherwise regarded, than as it hath the appearance of being sworn before persons legally commissioned, without which it would have no manner of credit, it seemeth that offences of this nature are most properly punished by severely chastising those who usurp such an authority of administering of oaths, without any legal warrant.

2 R. Abr. 257.
3 Inst. 166.

(a) 2 R. Abr. 257.

3 Inst. 166.
Yelv. 72.

(b) Cro. El. 169.

(c) 1 Sid. 274.

2 R. Abr. 237.

Latch. 38, 132.

(d) Yelv. 111.

3 Inst. 166.

Sec 4. Inst. 97.

29 Car. 2. c. 5.

4 Roll. 427.

4 Inst. 278.

(e) Sid. 148.

(1) 27. If any

magistrate is

justifiable in tak-

ing a voluntary

4 Comm. 187.

3 Inst. 165.

C. Car. 97, 98,
99.

1 Ven. 131.

However, it hath been adjudged, That a false oath, taken before persons, who, having been commissioned to examine witnesses, happen to proceed after the demise of the king who gave them their commission, and before notice thereof may be punished as perjury; for it would be of the utmost ill consequence to make such proceedings void; and therefore though all such commissions be in strictness legally determined by the demise of the king, who gave them, without any notice; yet for the necessity of the case, whatever is done under them before such notice, must be suffered to stand good; for otherwise the most innocent and most deserving subjects would be unavoidably exposed to numberless prosecutions for doing their duties, without any colour of a fault. And *Quære*, Whether a perjury in a court whose proceedings are afterwards reversed by error, may not still be punished as perjury, notwithstanding such reversal. (2)

(2) In the case of the King v. Alford, Summer assizes for Somerset, 1776, the defendant died for perjury in a cause tried at the assizes before Mr. Justice Willes. The caption of the indictment recited the names of the judges who were in the commission, and charged, "That at the said trial, before the honourable Edward Willes one of the justices aforesaid, the defendant swore a corporal oath, &c. He the said Edward Willes then and there having command under try to administer an oath to the defendant in that behalf," the prisoner was found guilty. But Mr. Baron Lyne, who tried the cause, doubted of the authority of *any commissioner* to administer the oath; the record of *officiis*, which was read in evidence, stating, in the usual form, that the trial was before both the judges and therefore, Another doubt arose whether the evidence maintained the indictment. On reference, the first Hilary term, 1777, the judges were unanimous, that either of the judges may administer the oath; consequently there was no variance, and the conviction good. B15.

SECT. 5. As to the fourth particular, *viz.* In what kind of oaths perjury may be committed. It seemeth clear, That a man may be in danger of being guilty thereof, not only in respect of a false oath, taken by him as a witness for another, but also in respect of a false oath taken by him in his own cause, either in an answer to questions put to him in a court of (a) law or (b) equity, having power to purge him upon oath concerning his knowledge of the matters in dispute, or in his (c) affidavit concerning some collateral matter wherein the parties own oaths are allowed to be taken. But it seems; That a juror who gives a verdict contrary to manifest evidence, is not properly guilty of perjury within the above mentioned description, because he is not sworn to depose the truth, but only to give a true judgment upon the deposition of others, and in many cases is not punishable at all *in foro humano*, as shall be set forth more at large in the chapter of conspiracy.

(a) 1 R. Abr. 40.
83.
C. Bar. 606.
(b) 1 Leon. 127.
C. 111. 335.
50.
3 R. Abr. 40.
65.
154. 244.
(c) 1 Roll. 79.
Noy 128.
5 Modon 348.
Moor 636.
2 Kenie 472.
2 R. Abr. 77.

(d) Paim. 294.
Hetty 97.
2 R. Abr. 77.
51 R. 106.
C. 111. 335.

SECT. 6. As to the fifth particular, *viz.* How far the matter of the oath which may amount to perjury, must be false. It (d) is said not to be material whether the fact which is sworn, be in itself true or false; for howsoever the thing sworn may happen to prove agreeable to the truth, yet if it

were

were not known to be so by him who swears to it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears, That he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavours to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might make as well as he.

Self. 7. As to the sixth particular, *viz.* How far the oath must be absolute. It is said, That no oath shall amount to perjury unless it be sworn absolutely and directly; and therefore, That he who swears a thing according as he thinks, remembers, or believes, cannot in respect of such an oath be found guilty of perjury. 3 Inst. 166.

Self. 8. As to the seventh particular, *viz.* How far the thing sworn ought to be material to the point in question? It seemeth clear, That if the oath for which a man is indicted of perjury, be wholly foreign from that purpose, or altogether immaterial, and neither any way pertinent to the matter in question, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant. As if upon a trial, in which the question is, whether such a one was *compos* or not, a witness introduces his evidence by giving a history of a journey which he took to see the party, and happens to swear falsely in relation to some of the circumstances of the journey. Also it hath been adjudged, That where a witness being asked by a judge, whether *A.* brought a certain number of sheep from one town to another altogether? answered, That he did so; where in truth *A.* did not bring them all together, but part at one time and part at another, yet such witness was not guilty of perjury, because the substance of the question was, whether *A.* did bring them at all or not, and that manner of bringing them was only a circumstance. And upon the same ground it is said to have been adjudged, That where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties? answered, That it was, where in truth it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because as the case was it was no way material whether it were paid for one or both. Also it is said to have been resolved, That a witness who swore that one drew his dagger and beat and wounded *J. S.* where in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. 1 Freeman. 506.
1 Sid. 274.
Vide inf. f. 22.
Aley 79.
1 R. Abr. 141.
78.
C. Eliz. 500.
Saigeld 514.
Nov. 36.
2 Roll. 145.
C. Car. 521.
Hubart 53.
Carth. 422.
5 Mod. 345, 348.
3 Inst. 164.

2 Roll. 41. 369.

2 Roll. 42.

Hutley 97.

But perhaps in all these cases it ought to be intended, That the question was put in such a manner, that the witness might

• Roll. 368.
• Almer 382.

reasonably apprehend that the sole design of putting it, was to be informed of the substantial part of it, which might induce him thro' inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly, That the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds, I cannot but think the opinion of those judges very reasonable, who held, That a witness was guilty of perjury, who in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's, because they were marked with such a mark, which he knew to be the defendant's mark, where in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and though it signified nothing to the merits of the cause, whether the sheep had any mark at all or not, yet inasmuch as the assigning such a circumstance in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it should not be equally punishable. But I cannot find this matter any where thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which from the consideration of the circumstances of each particular case, may generally without any great difficulty discern whether the matter in which perjury is assigned, were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not.

• Siderfin 274.

But it is said in *Siderfin*, speaking as I suppose of an answer in chancery, that a man may be guilty of perjury at the common law by swearing a thing not material. But surely this ought not to be understood in so great a latitude, as if it were meant that every falsity in such an answer must needs be perjury, howsoever foreign, circumstantial and trivial the point wherein it is assigned may be, which is directly contrary to what seems to be clearly taken for granted in other books. And therefore perhaps

perhaps where it is said that a man may be guilty of perjury in a thing not material, no more may be meant, but that he may be as well guilty thereof, by answering to a matter not charged in the bill, as by answering to the matters therein contained, which may alone be said to be material, because the defendant is not obliged in his answer to take notice of any thing else. Or else perhaps the meaning may be, That in a prosecution for perjury at common law, setting forth a false oath in such an answer, relating to the thing said to be in variance, the falsity shall be intended *prima facie* to have been some way material in the cause, unless the contrary be proved by the other side: Whereas in all prosecutions upon the statute, it is necessary expressly to shew in what manner the false oath is material to the cause in question, because that statute, extending only to such perjuries whereby some person is grieved, cannot maintain a prosecution which does not bring the case within the purview of it, by shewing that some one was grieved by the injury complained of, which he could not be, unless the thing sworn were some way material. However it seemeth to be clear, That a man may as well be guilty of perjury by a false oath tending to extenuate or aggravate the damages, as by an oath which is direct to the fact in issue. (3)

Vide inf. s. 23.

C. Jac. 212.
12 Co. 101.
2 Leon. 198.

(3) It is not necessary that it appear to what degree the point in which a man is perjured, was material to the issue; for if it is but circumstantially material, it will be perjury. *Ld. Raymond* 258. Much less is it necessary that the evidence be sufficient for the plaintiff to recover upon; for in the nature of the thing an evidence may be very material, and yet it may not be full enough to prove directly the point in question. *Ld. Raymond* 889. And it is incumbent on the prosecutor to prove the materiality of the perjury. *O. B.* 1784. p. 305.

Sec. 9. As to the eighth particular, *viz.* How far the false oath must be credited, It hath been holden not to be material upon an indictment of perjury at common law, whether the false oath were at all credited, (4) or whether the party in whose prejudice it was intended, were in the event any way aggrieved by it or not, inasmuch as this is not a prosecution grounded on the damage to the party, but on the abuse of *publick justice*.

3 Leon. 270.
2 Leon. 217.

(4) But on the trial the oath will be taken as true, until it be disproved; and therefore to convict a man of perjury, a probable, credible witness is not enough; for the evidence must be strong, clear, and more numerous on the part of the prosecution than the evidence on the other side. Therefore, the law will not permit a man to be convicted of perjury, unless there are two witnesses at least. *O. B.* 1786. p. 812. 10 Modern 195. Nor shall the party prejudiced by the perjury be admitted as a witness to prove it. *L. Raymond* 396.

Sec. 10. SUBORNATION of perjury by the common law, seems to be an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath; but it seemeth clear, That if the person incited take such an oath, do not actually take it, the person by whom he was so incited

1 R. Ait. 44
57. 79.
Yelv. 72.
C. Jac. 6. 58.
C. C. 337.
2 Keb. 399.

3 Mod. 121.

See p. 325.
For a further
punishment in-
flicted by 2 Geo. 2. c. 25. Vide also p. 335. sect. 29.

ed is not guilty of subornation of perjury; yet it is certain, That he is liable to be punished not only by fine, but also by infamous corporal punishment.

Of perjury by
5 Eliz. c. 9.

Sect. 11. Thus far of perjury, and subornation of perjury by the common law. And now I shall proceed to examine in what manner these offences are restrained by statute; as to which it is to be observed, that it is enacted by 5 Eliz. c. 9. "That whoever shall unlawfully and corruptly procure any witness, or witnesses by letters, rewards, promises, or by any other sinister and unlawful labour or means whatsoever, to commit any wilful and corrupt perjury, in any matter or cause whatsoever, depending in suit and variance, by any writ, action, bill, complaint, or information, in any wise concerning any lands, tenements, or hereditaments, or goods, chattels, debts or damages, in any of the king's courts of Chancery, Whitehall, or elsewhere, within any of the king's dominions of England or Wales, or the marches of the same, where any person or persons shall have authority by virtue of the king's commission, patent, or writ, to hold plea of land, or to examine, hear, or determine, any title of lands or any matter or witnesses concerning the title, right, or interests of any lands or tenements, or hereditaments, or in any of the king's courts of record, or in any lleet, view, or frank-pledge or law-day, ancient demesne-court, hundred-court, court-baron, or in the court or courts of Stannary in the counties of Devon or Cornwall, or shall unlawfully and corruptly procure or suborn any witness or witnesses, who shall be sworn to testify *in perpetuam rei memoriam*, shall for such offence, being thereof lawfully convicted or attainted, forfeit the sum of forty pounds. And if any such offender so being convicted or attainted, shall not have any goods or chattels, lands, or tenements, to the value of forty pounds, that then every such person shall suffer imprisonment by the space of one half year without bail or mainprize, and stand upon the pillory the space of one whole hour, in some market-town next adjoining to the place where the offence was committed, in open market there, or in the market town itself where the offence was committed."

Sect. 12. Also it is further enacted by the said statute, par. 5. "That no person being so convicted or attainted, shall from thenceforth be received as a witness in any court of record, in any of the king's dominions of England, Wales, or the marches of the same, till such judgment against him shall be reversed by attain, or otherwise; and that upon every such reversal, the party
"grieved

"grieved shall recover damages against the party who did
 "procure the said judgment to be reversed to be first given, &c." Sec. 1 Sid. 216.

Sec. 13. And it is farther enacted, par. 6. "That if
 "any person or persons shall either by the subornation,
 "unlawful procurement, sinister persuasion, or means of
 "any other, or by their own act, consent, or agree-
 "ment, wilfully, and corruptly commit any manner of
 "wilful perjury, by his or their deposition, in any of
 "the courts before mentioned, or being examined *ad per-*
 "*petuam rei memoriam*, That then every such offender being du-
 "ly convicted or attained, shall forfeit twenty pounds, and
 "have imprisonment by the space of six months without
 "bail or mainprize; and the oath of such an offender
 "shall not from thenceforth be received in any court of
 "record in England or Wales, until such judgment shall
 "be reversed, &c. on which reversal the party grieved shall
 "recover damages in the manner before mentioned."

And it is farther enacted, par. 7. "That if such offen-
 "der shall not have goods or chattels to the value of
 "twenty pounds, That then such person shall be set on the
 "pillory in some market place within the shire, city, or
 "borough, where the offence shall be committed by the she-
 "riff or his ministers, if it shall fortune to be without any
 "city or town corporate, and if it happen to be within any
 "such city or town corporate, then by the head officer of such
 "city, &c. where he shall have both ears nailed, &c."

Sec. 14. And it is further enacted, par. 8, 9. "That
 "one moiety of the said forfeiture shall be to the king, and
 "the other moiety to such person as shall be grieved, hinder-
 "ed, or molested, by reason of any of the offences be-
 "fore mentioned, that will sue for the same, &c. and that as
 "well the judge and judges of every such of the said courts
 "where any such suits shall be, and whereupon any such
 "perjury shall be committed, as also the justices or assize
 "and gaol-delivery, and justices of the peace at their quar-
 "ter sessions, (5) both within the liberties and without, (c) *Prosecutions*
 "may enquire of, hear, and determine all offences against upon this sta-
 "the said act." ute, being more
 precise than
 by indictment at

common law, are very seldom brought, especially at the sessions; and at common law justices
 or the peace have no jurisdiction over the offence. 2 Hawk. c. 8. s. 38. *Stranger, 1802.*
 The later and most usual mode therefore is by indictment at the assizes, or in the King's
 Bench. 3 Burn. 294.

Sec. 15. But it is provided, par. 11. "That the said
 "act shall no way extend to any spiritual, or ecclesiastical
 "court, but that every such offender as shall offend in form
 "as aforesaid, shall be punished by such usual and ordi-
 "nary laws as are used in the said courts."

Punishment of
perjury.

Stat. 16. Also it is provided, par. 13. "That the said statute shall not restrain the authority of any judge, having absolute power to punish perjury before the making thereof, but that every such judge may proceed in the punishment of all offences, punishable before the making of the said statute in such wise as they might have done, and used to do, to all purposes, so that they set not upon the offender less punishment than is contained in the said act." From whence it seemeth undoubtedly to follow, that the court of King's Bench, &c. proceeding upon an indictment, or information of perjury, or subornation of perjury at common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any enquiry concerning the value of his land or goods.

Offenders may
be transported.
Vide infra sect.
29. for the pu-
nishment of per-
sons convicted
of perjury, &c.
acting as attor-
neys.

+ And by 2 Geo. 2. c. 25. made perpetual, by 9 Geo. 2. c. 8. "Besides the punishment already to be inflicted by law for so great crimes, it shall be lawful for the court or judge before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labour during all the said time; or otherwise to be transported for a term not exceeding seven years, as the court shall think most proper."

But for the better understanding of the other parts of this statute, I shall consider the following particulars: First, How far the very words of the statute must be pursued in a prosecution grounded thereon. Secondly, In what kind of oaths one may incur the danger thereof. Thirdly, How far the false oath must appear to have been prejudicial to some person.

3 Leon. 211.
214.
Shower 193.
C. Fl. 105. 147.
Savil 43.
3 Leon. 230.
Heti. 12.
Holt 534.
Skjane 443.

Stat. 17. As to the first of these particulars it hath been holden, That in every prosecution on this statute the words thereof must be exactly pursued, and therefore that an indictment or action on the said statute, alledging that the defendant deposed such a matter *falso & deceptivo*, or *falso & corrupto*, or *falso & voluntario*, without expressly saying, that he did it *voluntarie & corrupte*, is not good; and that such a defect cannot be supplied by adding the words *contra formam statuti*, or concluding *& sic voluntarium, & corruptum convicti perjurium*: Also it hath been holden, That it is necessary expressly to alledge that the defendant was sworn, and therefore that it is not sufficient to say, that *scilicet per se sacro evangelii fuisse depositum*.

Stat.

Stat. 18. However it hath been resolved, That it is not necessary to shew whether the party, who is accused of perjury, did take the false oath through the subornation of another, or without any such subornation, notwithstanding the words of the statute are, "If any person either by the subornation, unlawful procurement, sinister persuasion, or means of any other, or by their own act, consent, or agreement, commit wilful perjury, &c." for inasmuch as there is no medium between the two branches of this distinction, so that all perjury whatsoever must needs come within one of them; and it is no way material under which of them it doth come, it is a reasonable exposition to look on the said words as put into the statute *ex abundanti*, seeing they express no more than the law must needs have implied without them; from whence it follows, That they operate no more than if they had not been expressed, and consequently shall not oblige the prosecutor necessarily to pursue them, which would put him under the difficulty not only of proving the perjury, which alone is material, but also of shewing it to be within one of the branches of the said distinction, which is nothing to the purpose.

3 Bull. 247.

vid. up
C. 10. s. 2.

Stat. 19. As to the second of the above mentioned particulars, viz. In what kind of oaths one may incur the danger of this statute, it hath been resolved, That no one can be guilty of perjury within the meaning thereof, in any case wherein a man may not possibly be guilty also of subornation of perjury within the same statute; for it is very reasonable to give the whole statute the same construction; nor can it well be intended, that the makers thereof, who expressly inflict a greater penalty on subornation of perjury, than on the perjury itself, should mean to extend the purview of the law in relation to what they esteemed the lesser crime, farther than in relation to that which they esteemed the greater; from whence it hath been argued and determined, That because that part of the statute, which concerns subornation of perjury, extends only to subornation of perjury in "Matters depending in suit by writ, action, bill, plaint, or information, in any wise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c." therefore the following clause concerning perjury itself, though it be penned in more general words, shall come under the same restriction. And from hence it clearly follows, That no perjury upon an indictment or criminal information, can bring a man within the danger of the statute, because they are omitted in the abovementioned clause. Also upon this ground it seems easy to account for the judgment in *Price's case*, who being indicted for a perjury supposed to be committed by him in an information for the king, which as I suppose must be intended to have been a criminal one, was discharged upon an exception

5 Co. 99.

C. 11. 113.

3 Inst. 164.

exception taken to the indictment; but if the information, whereon the said perjury was supposed to have been committed, had been of a civil nature, I do not see any reason why it should not be as well within the meaning, as it seems to be expressly within the words of the statute; for surely the opinion, That the king cannot by indictment, which is his own proper suit, punish his own witness, who swears for him, cannot be agreeable to law, because however the perjury of such a witness may seem to tend to promote the king's interest in relation to the cause which happens to be in dispute, yet certainly it is as heinous a crime in its own nature, and as much an abuse to justice, and of the same ill consequence to the public, and consequently as worthy of the king's resentment, as if it had been taken against him.

But he is punishable for the same by indictment at common law. Bar. Manual. 1139.

SECT. 20. Also it hath been resolved, That this statute extends to no other perjury except that of a witness, not only because the clause concerning subornation, to which the subsequent clause concerning perjury has a reference, relates to perjury by witnesses only, but also because the clause concerning perjury, mentions only perjury committed by persons in their examinations, *ad perpetuam rei memoriam*, or else in their depositions in some of the courts above mentioned, which in common speech are taken for such oaths only as are taken by a witness; and from hence it follows, That no one can come within the statute by reason of any false oath in an (a) answer to a bill in Chancery, or in (b) swearing the peace against another, or in a (c) presentative made by him as homager of a court-baron, or by reason of a false (d) wager of law, or for taking a false oath before (e) commissioners appointed by the king to make an inquiry concerning his title to certain lands.

(a) 11 Eliz. 148.
2 Leon. 201.
Dutton 84.
Yelv. 120.
(b) 12 R. Ab. 77.
(c) 2 Leon 201.
(d) 11 Nov. 108.
Finch 45.
(e) Major 67.

SECT. 21. Also it hath been said, That he who makes a false affidavit against a man in a court of justice is not within this statute. But perhaps the books wherein this opinion is holden, ought to be intended only of such affidavits which no way relate to a cause depending in suit before such court; for if they be of such a nature, That either of the parties in variance be grieved, hindered, or molested in respect of their cause in such court by reason of the perjury; as where a trial is put off, or a judgment or execution set aside upon a false affidavit; the offence seems to be not only within the meaning of the statute, but also within the very letter of it, unless the words, witnesses and depositions are confined to so strict a signification, as to bear no kind of application to any other person or oaths, except those which are made use of upon the trial of the issue in question, for which I cannot find any good authority. However partly perhaps from this notion, and partly because

2 R. Ab. 77.
1 Roll 79.
3 Keble 345.

Vide 2 Leon. 40.
1 R. Ab. 342.

because the statute speaks expressly only of depositions in the courts above mentioned, it hath been questioned, Whether a false oath before a sheriff upon a writ of enquiry of damages, be within the statute or not? But if it be considered, That the party to whose prejudice such a false oath is taken is as much aggrieved by it, as if it had been taken in the very court, and the principal judgment of the cause depends upon such an inquiry; and the depositions made before the sheriff, may as properly be said to be depositions in the court, by which the sheriff is commissioned to take the inquiry, as depositions taken before justices of *nisi prius*, upon a trial of an issue joined in a superior court, which are undoubtedly within the meaning of the statute; and also inasmuch as those who give evidence before a sheriff upon such an inquiry may, in the common use of words, be as properly called witnesses, as those who give evidence before the court in which an issue is joined, it seemeth to be the more plausible opinion, that such a perjury is within the statute: But since it is disputable, whether it be so or no, and it is certain that it is perjury at common law, and that in all cases whatsoever where a man takes a false oath, which is not perjury within the statute, but is looked on as perjury at common law, he is still punishable for it by indictment or information at the common law, it is certainly most advisable to prosecute such an offender at the common law, and not upon the statute.

Obf. on the
stat. 72.

See the authorities
above cited.

C. Jac. 1.

King v. Thorngood, Trin. 9 Geo. 1. The defendant made an affidavit in the Common Pleas, and confessed it was false; the court recorded his confession, and sentenced him to the pillory. It was objected that this court has no jurisdiction, and that he ought to be brought before the court by indictment, but these objections were over-ruled, because any court may punish such an offence committed in *facie curie*, under this act of 5 Eliz. c. 9. 3 Mod. 179.

Sec. 22. As to the third particular, *viz.* How far the false oath must appear to have been prejudicial to some person, it hath been collected from the above mentioned clause which giveth an action to the party grieved by the offences mentioned in the statute, That no false oath is within the meaning thereof, which does not give some person a just cause of complaint; and upon this ground it hath been said, That he who swears a thing which is true, but not known by him to be so, is not within the statute, because howsoever heinous his offence may be in its own nature, yet, when it proves in the event to be in maintenance of the truth, it cannot be said to give him a just cause of complaint, who would take advantage against another from his want of legal evidence to make out the justice of his cause.

3 Inst. 151.
Vid. sup. p. 1. 6.
Hutley 97.
Contra.

Sec. 23. Also from the same ground it seemeth clearly to follow, That no false oath can be within the statute, unless

Wile sup. f. 8.
2 3 Inst. 167.

Co. Ent. 164.
6 Mod. 168.
2 Roll. 76.
1 Keb. 452-935,
941.
Raym. 302.
2 Leon. 12.
2 Roll 427.
C. Car. 351.
352, 353.
1 Keb. 452.
C. Eliz. 428.

1 Keb. 935,
941.

Sid. 106.

2 Leon. 12.
3 Leon. 63.

2 Leon. 40.

less the party against whom it was sworn suffered some kind of disadvantage by it, for otherwise it cannot be said that any one was grieved, hindered, or molested by it; and therefore it is certain, That in every prosecution upon the statute, it is necessary to set forth the record of the cause wherein the perjury complained of is supposed to have been committed; and also to prove at the trial of the cause, that there is actually such a record, by producing the record itself, or a true copy thereof, which must agree with that which is set forth in the pleadings, without any material variance; for otherwise it cannot legally appear, That there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed. Also it seems to be agreed, That it is necessary not only to set forth the point wherein the false oath was assigned, but also to shew in what manner it conduced to the proof or disproof of the matter in debate between the parties; and it hath been adjudged, That an indictment setting forth a suit concerning the manor of *Dale*, and assigning a false oath concerning the manor (*Manerium prædictum innuendo*) is not good, because it no otherwise appears, That the false oath did concern the manor of *Dale*, but by the *Innuendo*, which is not a sufficient averment. Also upon the same ground it seems to be safest in a prosecution upon the statute for a false oath in Chancery, to set forth the bill and answer, That the plaintiff may appear to have been aggrieved by it; and for the same reason it seemeth also, That you ought, in such a prosecution of a witness in Chancery, to set forth the interrogatory in particular, and to shew how it was material. Also it hath been resolved, That as in an action on the statute brought by one person, it must appear, That the false oath was prejudicial to the plaintiff; so in an action by more than one, it must appear to have been prejudicial to every one of the plaintiffs; And it hath been said, That it is not sufficient to shew that the false oath caused the court to make an award against the plaintiff, unless it also appear that such an award was prejudicial to him, and therefore where the plaintiff at a trial in ejectment challenged a juror, and proved his challenge by a false oath, by reason whereof the inquest was not taken, and consequently the possession of the defendant, who had a defeasible title, continued longer than it otherwise would have done; it hath been adjudged, That such a defendant cannot have an action on the statute against such witness, because in truth he gained an advantage by the perjury. Also it hath been holden, That it is not sufficient to shew that the perjury, for which an action is brought upon the statute, was actually prejudicial to the plaintiff, unless it be also shewn to have been made in some cause which may properly be said to have been depending

depending in suit between him and the person for whom the witness was examined; and therefore it hath been holden, That where A. brought a bill in Chancery against B. and the lord keeper, by an order made C. to be as a party to the bill against B. and afterwards a commission went forth to examine witnesses between B. and C. upon which D. being produced as a witness on the part of C. swore directly for him against B. whereupon a decree was made against B. yet B. cannot have an action on the statute, because C. was not a party to the suit, but came in *a latere*, by an order; and it is said, That the words of the statute are, "where one is grieved by a deposition in a suit between party and party;" but perhaps the authority of this opinion may justly be questioned, not only because the words of the statute whereon it is grounded are mistaken, but also because the offence seems in truth to be both within the meaning and letter of the law, since thereby a person is grieved in respect of a cause depending in suit in a court mentioned in the statute: However there seems to be no doubt, but that a perjury which only tends to increase or lessen the damages to be given to a plaintiff, is as much within the statute, as any perjury which goes directly to the point of the issue: Also it seemeth to be settled, That perjury in a cause wherein an erroneous judgment is given, is a good foundation of a prosecution upon the statute, while such judgment stands unreversed.

2 Leon. 192.
1 Keb. 9.
Raymond 74.
1 Sid. 148.
2 Keb. 728.
854.
1 Keb. 531.

† *Stat. 24.* It is enacted by 8 Geo. 1. c. 6. "That if any person making such affirmation or declaration as is appointed by this act, shall be lawfully convicted of wilful, false and corrupt affirming or declaring any matter or thing, which if sworn in the common or usual form, would have amounted to wilful and corrupt perjury; every person so offending shall incur and suffer such and the same pains, penalties and forfeitures as are inflicted or enacted by the laws against persons convicted of wilful and corrupt perjury."

Quakers.

† *Stat. 25.* It is also enacted by 31 Geo. 2. c. 10. f. 24. "That whosoever shall willingly and knowingly take a false oath, or procure any person to take a false oath, to obtain the probate of any will or wills, or to obtain letters of administration in order to receive the payment of any wages, pay, or other allowances of money, or prize money, due, or that were supposed to be due, to any officer, seaman, or other person intitled, or supposed to be intitled, to any wages, pay, or other allowances of money or prize money, for service due on board of any ship or vessel of his majesty, &c. or the executor, administrator, wife, relation or creditor of any such officer or seaman, or other person who has

Probate of wills.
O. B. 1784. p.
909.

“ has really served, or was supposed to have served on board
 “ of any ship or vessel of his majesty, &c. shall be deemed
 “ guilty of felony, and suffer death without benefit of
 “ clergy.” (6)

(6) By 28 Geo. 2. c. 13. s. 14. For the relief of insolvent debtors, if any sheriff or other officer perjure himself, in taking the oaths directed by the act, he shall forfeit 500*l*.—And if the offence be committed by a prisoner, or other person enabled and intending to take the benefit of the act, it is felony without clergy.—Vide, also, 23 Geo. 3. c. 31. respecting perjury of freeholders at elections for Cricklade.

Form of the indictment.

† *Sec.* 26. It is recited by 23 Geo. 2. c. 11. “ Whereas by reason of difficulties attending prosecutions for perjury and subornation of perjury, those heinous crimes have frequently gone unpunished.” For remedy whereof it is enacted “ That in every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance “ of the offence charged upon the defendant, and by what “ court, or before whom the oath was taken, (averring such “ court, or person or persons to have a competent authority “ to administer the same) together with the proper averments “ or averments to falsify the matter, or matters wherein the “ perjury or perjuries is or are assigned; without setting forth “ the bill, answer, (7) information, indictment, declaration, “ or any part of any record or proceeding, either in law or “ equity other than as aforesaid; and without setting forth the “ commission or authority of the court, or person or persons before whom the perjury was committed.”

(7) In perjury in an answer in Chancery it is not necessary to prove the identity of the person who swore the oath; it is sufficient if the hand-writing be proved and that the oath was subscribed by the master as being sworn before him. 2 Burrow 1189. See also *Q. R.* 1784. p. 912.

† *Sec.* 27. It is also further enacted by par. 2. “ That “ in every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others “ to commit wilful and corrupt perjury, it shall be sufficient “ to set forth the substance of the offence charged upon the “ defendant without setting forth the bill, answer, information, “ declaration, or any part of any record or “ proceeding either in law or equity, and without setting “ forth the commission or authority of the court, or person “ or persons before whom the perjury was committed, or was “ agreed or promised to be committed.” (8)

(8) In general the court will oblige the defendant to plead or to demur to even a defective indictment for this offence. 2 Hawk. c. 25. s. 146. They are also very cautious in granting a *certiorari* to remove it. 2 Hawk. c. 27. s. 28. And Lord Thurlow refused permission to amend an answer, where an indictment for perjury had only been threatened, even where the party, having no interest, could not be supposed to make the false oath intentionally.—*Brown's Cases in Chancery*, 419. For it is the province of the grand jury to judge of the intention. *Vaux v. Lord Waltham*. And what the grand jury may find, the court will never estoppe. *B. R. H.* 203.

† *Stat.* 28. And the better to prevent great offenders from escaping punishment by reason of the expence attending such prosecutions, It is further enacted by p. 3. "That it shall
 "and may be lawful to and for any of his majesty's justices
 "of assize, or nisi prius, or general gaol delivery, or of any
 "of the great sessions of Wales, or of the counties palatine;
 "and they are hereby authorised (sitting the court or within
 "twenty four hours after) to direct any person examined as a
 "witness upon any trial before him or them, to be prosecuted
 "for the said offence of perjury, in case there shall appear to
 "him or them a reasonable cause for such prosecution, and that
 "it shall appear to him or them proper so to do; and to assign
 "the party injured, or other person undertaking such prosecution,
 "counsel, who shall, and are hereby required to do their
 "duty without any fee, gratuity, or reward for the same."
 Such prosecution is also exempted from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the counsels names, &c.

The court may order perjured witnesses to be prosecuted.

† *Stat.* 29. And it is further enacted by 12 Geo. 1. c. 29.
 f. 4. "That if any person who hath been, or shall be convicted of wilful and corrupt perjury, or subornation of perjury, (9) shall act or practise as an attorney or solicitor, or agent in any suit or action, in any court of law, or equity, in England, the judge or judges of the court where such suit or action is or shall be brought, shall, upon complaint or information thereof, examine the matter in a summary way (10) in open court, and if it shall appear to the satisfaction of such judge or judges, that the party hath offended contrary to this act, such judge or judges, shall cause such offender to be transported for seven years."

Attornies.

(9) Or of forgery or common barratry.

(10) Vide 2 Bar. K. B. 34.

CHAPTER THE SEVENTIETH.

OF FORGERY.

OF Forgery there are two kinds: First, By common law. Secondly, By the statute. *Stat. 16. Fleta 2. c. 22.*

Stat. 1. Forgery, by the common law seemeth to be an offence in falsly and fraudulently making or altering any matter of record; or any other authentick matter of a publick nature; as a parish register or any deed or will; punishable by fine and imprisonment, and such other corporal punishment as the court in discretion shall think proper.

For the better understanding whereof, I shall endeavour to shew: First, In what cases the making or altering of a writing, shall be said to be so far false and fraudulent, as to amount to forgery. Secondly, That a man may be guilty of forgery in respect of all the above mentioned writings, and no other.

Sec. 2. As to the first particular, it is said to be possible for a man knowingly to make a deed in his own name, and also to sign and seal it himself, which yet in judgment of law, may be no better than a downright forgery; as if a man make a feoffment of certain lands to J. S. and afterwards make a deed of feoffment of the same lands to J. D. of a date prior to that of the feoffment to J. S. in which case he is said to be guilty of forgery, because he knowingly falsifies the date, in order to defraud his own feoffee, by making a second conveyance which at the time he had no power to make. Also it is said, That his crime would have been no less, if by his conveyance he had passed only an equitable interest for good consideration, and had afterwards by such a subsequent antedated conveyance endeavoured to avoid it. Also in many other cases a writing may be said to be forged where neither the hand nor seal of any one are forged; as where one being directed to draw up a will for a sick person, doth insert some legacies therein of his own head; or where one finding another's name at the bottom of a letter at a considerable distance from the other writing, causes the letter to be cut off, and a general release to be written above the name, and then takes off the seal, and fixes it under the release; or where one inserts into an indictment the names of those against whom in truth it was not found; or where one makes any fraudulent alteration of the form of a true deed in a material part of it; as by making a lease of the manor of Dale appear to be a lease of the manor of Sale, by changing the letter D. into an S. or by making a bond for five hundred pounds, expressed in figures, seem to have been made for five thousand, by adding a new cypher. But Sir Edward Coke seems to say, That a deed so altered may more properly be called a false than a forged writing, because it is not forged in the name of another, nor his seal nor hand counterfeited. But I see no good reason why such an alteration of a deed should not as properly be called forgery, as the entire making of a new deed in another's name; for in both cases not only the fraud and villainy are the very same, but also a man's hand and seal are falsely made use of, to testify his assent to an instrument, which after such an alteration is no more his deed than a stranger's. Also the notion of forgery doth not seem so much to consist in the counterfeiting a man's

3 Inst. 169.
Fulton 46.
27 H. 6. 5.
Moor 655, 759.
Noy 101.
3 Inst. 170.
Coun. Dyer 288.

3 Inst. 172.

9 Modern 66.
8 Modern 192.
Fitagibbon 261.
12 Mod. 493.
456.
Strange 69.

3 Inst. 169.
Moor 619.

3 Inst. 169.

Wide Moor 65.
3 Mod. 65.

a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have, as appears by the foregoing cases in this section, to most of which Sir Edward Coke himself seems to agree.

Vide 2 R.
Ab. 28, 29.
11 Coke 27.

Foster 216.

Sett. 3. But it seemeth to be clear, That he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks on this as the other's own sealing.

Pulton 46.
as H. 6. 4.

Sett. 4. Also it hath been adjudged, That he shall not be punished for forgery who raseth out the word *libris* out of a bond made to himself, and putteth in *Marcis*, because here is no appearance of a fraudulent design to cheat another, and the alteration is prejudicial to none but to him who makes it, whose security for his money is wholly avoided by it; yet it is said, That it would be forgery, if by the circumstances of the case it should any way appear to have been done with an eye of gaining an advantage to the party himself, or of prejudicing a third person. Also it is holden, That such an alteration, even without these circumstances is a misdemeanor, though it be no forgery.

Noy 99.
Moor 655.
Salk. 376.

Sett. 5. It hath been resolved, That a man shall not be adjudged guilty of forgery for writing a will for another without any directions from him, who becomes *non compos* before it is brought to him; for it is not the bare writing an instrument in another's name without his privy, but the giving it a false appearance of having been executed by him, which makes a man guilty of forgery.

Moor 760.

Sett. 6. It is said, That regularly a man cannot commit an act of forgery by a bare nonfeasance, as by omitting a legacy out of a will, which he is directed to draw for another. Yet it hath been holden by some, even in this very case, That if the omission of a bequest to one cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causeth a devise of the same lands to another to pass a present estate, which otherwise would have passed a remainder only, he who makes such an omission is guilty of forgery. In this case the first enquiry should be, with what intention the omission was made.

Moor 760.
Noy 141.

1 Sid. 142.

Sett. 7. It seemeth to be no way material, whether a forged instrument be made in such a manner, That if it were in truth such as it is counterfeited for, it would be of validity, or not; and upon this ground it hath been adjudged, That the forgery of a protection in the name of A. B. as being a member of parliament, who in truth at the time was not a member, is as much a crime as if he were.

And now I am to shew in the second place, That a man may be guilty of forgery at common law, in respect of any of the above-mentioned writings, and of no other.

1 R. Abr. 6576.
Yelv. 146.
C. Eliz. 178.
3 Mod. 66.
8 Mod. 102.
12 Mod. 495.
496.
Strange 69.

Sett. 8. And first it is clear, That one may be guilty thereof by the common law, by counterfeiting a matter of record; for since the law gives the highest credit to all records, it cannot but be of the utmost ill consequence to the publick, to have them either forged or falsified.

(a) 1 R. Abr. 68.
C. Car. 226.
1 Leon. 225.
(b) 1 R. Abr. 68.
2 Bull. 137.
(c) 1 R. Abr. 68.
(d) 1 R. Abr. 147.

Sett. 9. Secondly, Also there seemeth to be no doubt, but that one may be guilty of this crime by the common law, by forging any other authentick matter of a publick nature, as a (a) privy seal, or a (b) licence from the bastons of the Exchequer to compound a debt, or a (c) certificate of holy orders, or a (d) protection from a parliament man.

(e) 1 R. Abr. 68.
R. 2. 216.
C. 1. 47.
1 S. 2. 277.
3 Leon. 176.
(f) Moor 700.
Noy 101.
Dyer 212. It is
nowise to be
by a 1. 1. 1. 1.
2. 1. 1. 1. 1. 1.

Sett. 10. Thirdly, It is also unquestionable, That a man may be in like manner guilty of forgery at common law, by forging a (e) deed, and surely there cannot be any reason to doubt, but that one may be equally guilty by forging a (f) will, which cannot be thought to be of less consequence than a deed. But I do not find this point any where directly holden.

(g) 1 R. Abr. 68.
1 S. 2. 10, 115.
451.
1 R. Abr. 66.
Windsor 42, 60.
3 Leon. 231.
1 Leon. 101.
C. Eliz. 299.
257.
3 S. 2. 265.
(h) C. Eliz. 166.
1 Yelv. 146.
1 Bull. 137.
(i) 1 R. Abr. 68.
90 93, 100.

Sett. 11. As to other writings of an inferior nature, it seems to have been generally laid down as a (g) rule, That the counterfeiting of them is not properly forgery; (i) and some have gone so far as to hold, That the forging another's hand, and thereby receiving rent due to him from his tenants, is not punishable at all; and therefore it cannot but be more safe to proceed against offences of this nature, as cheats than as forgeries; but surely it cannot be proved by any good authority, That such base crimes are wholly disregarded by the common law, as not deserving a publick prosecution; for the opinion in the books above cited, That they are punishable by no law, seems by no means to be maintainable, since many of them are most certainly punishable by force of 33 Hen. 8. c. 1. which is set forth at large in the following chapter. Neither can it be a convincing argument, That they are not punishable at common law; (i) because

because they are, of a private nature; since deeds concerning private matters are also of a private nature, as much as other writings concerning such matters; yet no one will say, That the making a false deed concerning a private matter is not punishable at common law. But perhaps it may be reasonable to make this distinction between the counterfeiting of such writings, the forgery whereof hath been already shewn to be properly punishable as forgery, and the counterfeiting of other writings of an inferior nature, that the former is in itself criminal, whether any third person be actually injured thereby or not, but that the latter is no crime, unless some one receive a prejudice from it. (1)

(1) Vide Barnard, K. B. 10. Id. Raym. 1461. 2 Bac. Abr. 568. Where these opinions were very fully considered in the case of the King v. John Ward, of Hackney; and in which it was determined that to forge a release or acquittance for the delivery of goods; although not under seal, was forgery at common law. Vide also Lord Raym. 737. 5 Mod. 137. Raym. 51. and Stuang: 747.

Sec. 12. Thus far of Forgery by common law.—And now I am to consider forgery by the statute, which depends upon 5 Eliz. c. 14. by which it is enacted, “That if any person or persons upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilly, and falsely forge or make, or subtilly cause, or wittingly assent to be forged or made, any false deed, charter, or writing sealed, court roll, or the will of any person or persons in writing, to the intent that the state or freehold or inheritance of any person or persons of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest, of any person or persons, of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered or charged; or shall pronounce, publish, or shew forth in evidence, any such false and forged deed, charter, writing, court roll, or will, as true, knowing the same as false and forged, as is aforesaid, to the intent above remembered, (except being an attorney, lawyer, or counsellor, he shall for his client, plead, shew forth, or give in evidence such false and forged deed, &c. to the forging whereof he was not party nor privy) and shall be thereof convicted either upon action or actions of forgery of false deeds, to be founded upon the said statute, at the suit of the party grieved or otherwise, according to the order and due course of the laws of this realm, &c. shall pay unto the party grieved his double costs and damages to be found or assessed in that court where such conviction shall be, and also shall be set upon the pillory in some open market town, or other open place, and there have both his ears cut off, and also his nostrils slit and cut, and seared with a hot iron, &c. and shall forfeit to the king the whole issues” and

Of Forgery by 5 Eliz. c. 14.

5—Eden 44

Par. 13

“ and profits of his lands and tenements, and suffer perpetual imprisonment, &c.”

Stat. 13. And it is farther enacted by the said statute, par. 3. “ That if any person or persons, upon his or their own head or imagination, or by false conspiracy or fraud had with any other, shall wittingly, subtilly and falsly forge or make, or wittingly, subtilly, and falsly cause or assent to be made and forged, any false charter, deed or writing, to the intent that any person or persons shall, or may have, or claim any estate or interest for a term of years, of, in, or to any manors, lands, tenements, or hereditaments, not being copyhold, or any annuity in fee-simple, fee-tail, or for term of life, lives or years, or shall as is aforesaid, forge, make, or cause, or assent to be made or forged, any obligation, or bill obligatory, or any acquittance, release, or other discharge of any debt, accompt, action, suit, demand, or other thing personal; or shall pronounce, publish or give in evidence, (except as before excepted) any such false or forged charter, deed, writing, obligation, bill obligatory, acquittance, release, or discharge, as true, knowing the same to be false and forged, and shall be thereof convicted by any of the ways and means aforesaid, he shall pay unto the party grieved his double costs and damages, to be found and assessed in such court, where the said conviction shall be had, and shall be also set upon the pillory in some open market town, or other open place, and there have one of his ears cut off, and also shall suffer imprisonment for one year, &c.”

Lutw. 190.

A second offence
felony without
clergy.

Stat. 14. And it is farther enacted by the same statute, par. 7 & 8, “ That if any person or persons being convicted or condemned of any of the offences aforesaid, by any of the ways or means above limited, shall after any such his or their conviction or condemnation, estoons commit or perpetrate any of the said offences in form aforesaid, that then every such second offence shall be adjudged felony without benefit of clergy, saving to all persons other than the said offenders, and such as claim to their uses, all such rights, &c. which they shall have to any the hereditaments of any such person, so as is aforesaid convicted or attainted, at any time before, &c. saving also the dower of such offender's wife, and the right of his heirs.

Stat. 15. And it is further enacted by the said statute, par. 10. “ That all justices of oyer and terminer, and justices of assize, shall have power to inquire of, hear and determine the offences aforesaid.”

Stat. 16. But it is provided, par. 9, 12, & 16. “ That this act or any thing therein contained, shall not extend to

“ any ordinary or his commissary, &c. for putting their seal of office to any will to be exhibited unto them, not knowing the same to be false or forged, or for writing of the said will or probate of the same, nor to any proctor, &c. of any ecclesiastical court, for the writing, setting forth, or pleading of any proxy made according to the ecclesiastical law, &c. for the appearance of any person being cited to appear in such court; nor to any archdeacon, or official, for putting their authentick seal to the said proxy or proxies, nor to any ecclesiastical judge for admitting the same; nor to any person who shall plead or shew forth any deed or writing exemplified under the great seal of England, or under the seal of any other authentick court of this realm; nor to any person who shall cause any seal of any court to be set to any such deed, charter, or writing enrolled, not knowing the same to be false or forged.”

In the construction of this statute the following points have been holden, 1 Hale 682, 68

Self. 17. First, That a false customary of a copyhold manor, made in parchment under the seals of several tenants of the manor, and containing in it divers false customs, apparently tending to the disherison of the lord, and falsely pretending by its title to be set forth by the consent of all the tenants, and allowance of the lord, is within the first branch of forgery mentioned in the statute, as being a sealed writing made to the intent to molest the inheritance of the lord. Dyer 322.
3 Leon. 108.

Self. 18. Secondly, That the forgery of a lease for years, or of a grant of a rent-charge for years, in the name of one who is seised of a freehold or inheritance, is also within the said first branch of the statute, because the said branch is penned in general words extending to any molestation whatsoever of such estate, without mentioning any estate or interest, in the claim whereof such molestation shall consist; and from this ground it follows, that those words in the second branch of forgery mentioned in the statute, “ To the intent that any person shall claim any estate or interest for term of years, &c.” are meant only of such forgeries which relate to such an estate or interest in *esse* before. 3 Inst. 17.
Noy 42.

Self. 19. Thirdly, That the forgery of a will in writing of one possessed of such an estate, mentioning a bequest thereof, is within the said second branch of the statute, as being a false writing, made to the intent that some person may claim an estate for years; notwithstanding the said branch makes no express mention of a will, as the first doth. Dyer 322.

Self. 20. Fourthly, That the forgery of a lease of lands in Ireland is not within either of the branches of the statute. 3 Leon. 170.

3 Leon.

Sec. 21. Fifthly, That the forgery of a deed containing a gift of mere personal chattels, is also no way within the statute, the words whereof to this purpose are, "If any person shall forge any obligation or bill obligatory, or any acquittance, release, or other discharge of any debt, account; action; suit, demand, or other thing personal."

Sec. 4

17 Leon.

15 H. 7.

2 R. 2. 4. 4.

Con. 31 ut. 1.

Sec. 22. Sixthly, That the forgery of a statute-merchant or of a recognizance in the nature of a statute-staple, by acknowledging them in the name of another are within the statute, as being obligations, because they must have the seal of the party, by the express words of the statutes, which appoint in what manner such statute or recognizance shall be taken. But that the forgery of the statute-staple is no way within the statute, because it needeth not the seal of the party, but only the seal of the staple provided for it.

3 Inst. 171.

1 Hale 65.

23. Seventhly, That he who is truly informed by another, that a deed is forged, is in danger of the statute if he afterwards publish the same to be true; notwithstanding the words of the statute be, "If any one shall publish, &c. such false and forged deed, &c. knowing the same to be false or forged."

2 Inst. 17

Sec. 24. Eighthly, That the double damages to be awarded to the party grieved by a forged release of an obligation, &c. shall be governed by the penalty, and not by the true debt appearing in the condition.

Sec. 25. Ninthly, That one who hath been convicted of publishing a forged deed, may become guilty of felony by forging another deed afterwards, as well as by publishing any such deed, notwithstanding the second offence be not of the very same nature with the first; for the words of the statute are, "If any person being convicted or condemned of any of the offences aforesaid, &c. shall after any such conviction or condemnation, sitibons commit any of the said offences."

11 Modern 1

Holt 326.

3 Keb. 350. 36.

3 Inst. 160.

Sec. 1 K. 2. 4.

2 Keb. 424.

O. et al. 39.

this kind.

2 Inst. 45.

501. 532.

F. 150.

Sec. 26. Tenthly, That notwithstanding it be necessary in every prosecution upon the statute strictly to pursue the very words of it, (for which cause it hath been resolved, That an indictment setting forth the forgery of a writing indented, without adding that it was sealed, is sufficient;) yet there is no necessity that the translation of such words be made in proper classical Latin, so that it be intelligible; and upon this ground it hath been adjudged, That an indictment, setting forth that the defendant *super caput suum proprium* did forge, &c. meaning thereby to express that he did it of his own head, is sufficient.

Sec.

Señ. 27. Eleventhly, That upon indictment of trespass, forgery, and publication of a deed, a verdict finding the defendant guilty *de transgression & forgeria prædictis prout superius in indictmente supponitur*, is sufficient, because these words *de transgression prædictis* include the whole. Also perhaps such a verdict may be sufficient for another reason, because the offence is equally within the statute, and the punishment the very same, whether the party be guilty both of the forgery and publication, or of one of them only.

Ven. 23, 24.
Salkeld 342.
5.
Lev. 111, 221.
Kebble 353.

For other determinations upon upon this statute, vide 2 Bac. Abr. 571. Keb. 707, 748, 803. Barnard, K. B. 168, 441, 461. and the case of the King v. Crooke. Besides this general act, a multitude of others, since the revolution, when paper currency was first established, have, in a variety of instances, inflicted capital punishment, on the crime of forgery. For which vide ante chapter fifty eight.

CHAPTER THE SEVENTY-FIRST.

O F C H E A T S.

OF Cheats punishable by publick prosecution, there are two kinds; By the common law, and by statute.

Señ. 1. And first it seemeth, that those which are punishable at common law, may in general be described to be deceitful practices, in defrauding or endeavouring to defraud another of his known right by means of some artful device, contrary to the plain rules of common honesty; as by (a) playing with false dice; or by (b) causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by (c) perswading a woman to execute writings to another, as her trustee upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c. or by (d) suppressing a will, or by (e) levying a fine in another's name, or (f) suing out an execution upon a judgment for him, or acknowledging an action in his name, without his privity, and against his in which cases, by some good (g) opinions the record may be vacated.

(a) 2 Roll. 10;
C. Jac. 497;
408.
2 R. Abr. 73.
1 K. B. 34.
Pau. Calc. 6.
Modern 42.
Lawrell 221.
(b) 1 K. B. 312.
(c) 1 Salk. 471.
(d) Noy 103.
(e) N. B. 59.
Moot 67.
C. 117, 531.
1 Mount 17.
2 Jones 62.
(f) Noy 60.
(g) See the
links above ci-
ted, but 2 R.
Abr. 607. 1.
& 12 Co. 223.
and generally.

Señ. 2. It (b) seemeth to be the better opinion, That the deceitful receiving of money from one man to another's use, upon a false pretence of having a message and order to that purpose, is not punishable by a criminal prosecution, because it is accompanied with no manner of artful contrivance,

(1) 6 Mod. 105.
Salkeld 370.
3. Modern 18.
Blackby 70.
L. Ray. 1013.
Self. Cas. 201.

Vide Wheatley's
Case, Burr. 1125
Black. 273.

but wholly depends on a bare naked lie; and it is said to be needless to provide severe laws for such mischiefs, against which common prudence and caution may be a sufficient security.

See the authorities cited in
sect. 1. And the
acts recited in
fra. sect. 8 and
9.

Sect. 3. Some of the above-mentioned offences are punishable not only with fine and imprisonment, but also with farther infamous punishment, (as cheating with false dice, especially if the offender be a common gamester) others are punishable with fine and imprisonment only, by the discretion of the judges, which is regulated by the circumstances of each particular case; and some of them are made felonies by 21 Jac. c. 26. as appeareth from chapter forty-five.

(1) Changing corn by a miller and returning bad corn instead of it, is punishable by indictment; for being in the way of trade it is deemed an offence against the publick, 1 Sess. Ca. 217. So also to run a foot race fraudulently, and by a previous understanding with the seeming competitor to win money. 6 Mod. 42. So also if an indentured apprentice enters himself as a soldier, and receives the bounty, and is discharged on his master's demanding him, he may be indicted. The King v. Jones, Leat Ass. Coventry, 1777.

1 Hale 506.
2 Sess. Cas. 27.
Strange 866.
Bar. K. B. 298,
337.
Salkeld 379.
6 Modern 105,
111, 301, 311.
9 St. Tr. 67.

Sect. 4. Offences of this kind by statute depend upon 33 Hen. 8. c. 1. by which it is enacted, "That if any person or persons shall falsely and deceitfully obtain or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by colour and means of any privy false token, or counterfeit letter made in another man's name, to a special friend or acquaintance, for the obtaining of money, &c. from such person, and shall be thereof convicted, by witness taken before the lord chancellor, or before the justices of assize, or before the justices of peace of any county, city, borough, town, or franchise, in their general sessions, or by action in any of the king's courts of record, every such offender shall suffer such punishment by imprisonment, setting upon the pillory, or otherwise by any corporal pains except pains of death, as shall be appointed by those before whom he shall be so convicted."

Sect. 5. And it is farther enacted by the said statute, "That as well the justices of assize for the time being, as also two justices of peace in the same county, whereof the one to be of the *quorum*, may call and convene by process, or otherwise, to the said assizes, or general sessions, any person being suspected of any of the offences aforesaid, and to commit or bail him till the next assizes or general sessions, &c."

Sect. 6. Sir Edward Coke is of opinion, That the offender cannot be fined in a prosecution upon this statute, because it is expressly ordained, That some corporal punishment shall be inflicted, and no other is mentioned; however, there is a precedent in Croke's Reports, by which it appears, That one convicted on such a prosecution hath been adjudged not only to

stand

Dalton 20.

3 Inst. 123.
C. Car. 564.

stand on the pillory, but also to pay a fine of five hundred pounds, and to be bound with good sureties to his good behaviour. (2)

(2) In indictments upon this statute, the false token made use of must be set forth. *Str.* 1127. And it has been held a false token to use for the purposes of deceit a counterfeit pass. *Dalt.* 91. Or a pretended power to discharge soldiers. 1 *Latch* 202. Or to obtain goods upon pretence of being of age and then pleading infancy. Or to produce papers purporting to be orders from abroad, and under the pretence of being a merchant to obtain goods. *Sayer* 206. Or to exchange a spurious wine for a genuine commodity under the pretence of being a merchant and broker. 6 *Mod.* 302. Or to sell the flesh of an unbranded bull as for deer beef. *Sayer* 147. Or to sell any commodity by a false measure. *Burr* 1125. But selling beer short of the just and due measure is not an indictable offence. 1 *Willson* 301. *Sayer* 146. 1 *Black.* 274. Nor selling gum of one denomination for that of another. *Sayer* 205. Nor selling wrought gold as for gold of the true standard, provided the offender is not a goldsmith. *Cowper* 323.

† *Stat.* 7. It is also enacted by 30 Geo. c. 24. "That O. B. 1785. No. 989.—Vide annotations to Adding. P. S. p. 272. N. B. No *cervicari* lies upon this statute. *Cowper* 24.
"all persons who knowingly and designedly by false pretences shall obtain from any person, money, goods, wares, or merchandizes with intent to cheat and defraud any person or persons of the same, shall on conviction be put in the pillory, or publickly whipped, or fined and imprisoned, or transported, not exceeding the space of seven years, as the court shall in discretion think fit."

† *Stat.* 8. It is also enacted by 16 Car. 2. c. 7. "That 2 Abr. Eq. Caf. 154. *Slidroff* 144. 1 *Levinz* 244. *Ld. Raym.* 69. 2 *Levinz* 44. 4 *Comm. Dig.* 70.
"if any person shall by any fraud, unlawful device, or other ill practice in playing at cards, dice, tables, tennis, bowls, skittles, shovelboard; or by cock-fighting, horse-racing, dog-matches, foot-races, or other pastimes, or games, or by bearing a share in the stakes, or by betting on the side of such as shall play, act, ride, or run as aforesaid, win any sum or other valuable thing, he shall forfeit treble the value in the manner the act directs."

† *Stat.* 9. It is also further enacted by 9 Ann c. 14. "That Vide *Strange* 1048. *The King* v. *Lookup*, where it was determined that the court cannot set a fine upon the offender on a conviction upon this act; that the only judgment they can give is, that he is convicted, &c.
"if any person shall by any fraud or shift, cozenage, circumvention, deceit or unlawful device, or ill practice whatsoever, in playing at cards, dice, tables, tennis, bowls, or any the games aforesaid, or bearing a share in the stakes, or betting on the sides of such as do play, win any sum of money, or other valuable thing, on conviction by information or indictment, he shall forfeit to such as shall sue for the same, five times the value, be deemed infamous, and suffer corporal punishment as in cases of perjury."

CHAPTER THE SEVENTY-SECOND, OF CONSPIRACY.

FOR the better understanding the nature of Conspiracy, I shall consider who may be said to be guilty of it, and in what manner such offenders are to be punished.

1 Inst. 562.
Reg. 134. a. 135
Coob. 444.

Sec. 1. As to the first point, there can be no better rule than the statute of 32, or rather 1 Edw. 1. the intent whereof was to make a final definition of conspirators, to which purpose it declareth, "That conspirators be they that do conteder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move and maintain pleas, and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious enterprizes; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, who by their seigniorie, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves."

L. Ray. 1160.
8 Mod. 321.
Burr. 930. 954.
1 Comm. 570.

Sec. 2. From this definition of conspirators it seems clearly to follow, That not only those who actually cause an innocent man to be indicted, and also to be tried upon the indictment, whereupon he is lawfully acquitted, are properly conspirators, but that those also are guilty of this offence, who barely conspire to indict a man falsely and maliciously, whether they do any act in prosecution of such conspiracy or not. For the words of the statute seem expressly to include all such confederacies under the notion of conspiracy, whether there be any prosecution thereof or not. And if such a confederacy be within the letter of the statute, there seems to no manner of reason to say, That they are not also within the meaning of it, since it is a high contempt of the law, barely to engage in such an association to abuse it, to serve the purposes of oppression and injustice. Neither can it be a severe construction which will bring a crime so evidently contrary to the first principles of common honesty, within the meaning of a law, the words whereof do plainly seem to extend to it.

And therefore I cannot but question the accuracy of that description of conspiracy which is given in the third Institute, whereby the lawful acquittal of the party grieved is required to make the offenders guilty of this crime. It is true indeed, That a bare conspiracy to indict a man will not maintain a writ of conspiracy at the suit of the party grieved, because it doth not do him any actual damage. Also it must be confessed, That it is often laid down as a general rule, and taken for granted, That no such conspiracy is a good foundation for such a writ, unless the plaintiff be lawfully acquitted. And it is certain, That there is no formed writ of conspiracy in the register for a malicious indictment or appeal; but what supposes such indictment or appeal to have been actually brought, and the party to have been legally discharged. From whence it follows, That no one can have the benefit of any such writ in the register, who upon a false accusation, is put to the trouble and vexation of being apprehended, examined, or committed, &c. without being ever indicted or appealed. However it is certain, That an acquittal by verdict is not always necessary to maintain such a writ, for it appears by the register itself that where one brought such a writ in the usual form, having it in the words *quousque acquietatus fuisset*, &c. against one who had been non-suited in a malicious appeal of felon, brought against him, his writ was abated, because such a non-suit would not make good the words *quousque acquietatus fuisset*, and yet he afterwards brought a new writ, wherein he used the words *quietus recessit*, instead of *acquietatus fuisset*, and recovered. And why may not a new writ as well be formed in any other case, which is as much within the mischief of the statute as this? Or what colour can there be to say, That the malicious putting of a man to the unreasonable charge, scandal, and trouble, of a criminal prosecution, which is so palpably groundless, as not to have probability enough to induce a grand jury to find an indictment, should not be as good a foundation of complaint, and a grievance as much within the meaning of the statute, as the putting one to the charge and vexation of a groundless action, either in a temporal or spiritual court, for which it appears by the (a) register, That a writ of conspiracy doth lie without making use either of the words *fuisset*, or *quietus recessit*. Neither can it be said, That the opinion I contend is wholly unsupported by authority, as appears from the Poulterer's case in (b) Coke's ninth report.

However since it is certain, That an (c) action on the case in the nature of such writ doth lie for a false and malicious prosecution, for any crime, whether capital, or not capital, though it doth not proceed to an actual indictment, or appeal, and that the same damages may be recovered in such action as in a writ of conspiracy, it hath been thought needless to inquire, whether such writ may be maintained for such

a pro-

3 Inst. 143.
Id. Ray. 378.
10 Mod. 219.
1 N. B. 114.
1 Dan. Abr. 213,
213.
S. P. C. 173,
174, 175.
B. Corone 89.
B. Appeal 68.
1 R. Abr. 110,
111, 114.
9 Co. 56, 57.
Register 154.
1 Jan. 63, 94.
5 Oxekil 21.
6 Modern 161.
Bulst. N. P. 14,
10 Modern 219.
B. Corone 6.
33 H. 6. 1.
See S. P. C. 174.
Vide 2 Inst.
407, 462.
1 Ventris 47.

(a) Regist

a 107.
1 117.
(b) 9

(c) 1 Jan. 93,
94.
1 Leon. 107.
C. Plaz. 70, 134.
Pam. 315.
C. Jac. 130,
137, 497.
Luch 70.
C. Cas. 15.

2 Roll. 256, 237. a prosecution or not. But howsoever the law may stand in relation to writs of conspiracy, there seems to be no manner of reason, that the stated form of such writs should any way restrain a proceeding by way of indictment or information against persons which are apparently within both the letter and meaning of the statute. (1)

2 Bull. 270,
271.
1 Roll. 109.
1 R. Ab. 112,
213.
Ray 135, 180.
Con. 1 Bull.
185.
Yelv. 116. Hutt. 49. C. Eliz. 563. 9 Co. 57. 563. 9 Co. 57. 5 Mod. 394, 4995. 1 Salkeld, 13. Dauv. 208. Strange 691.. 1 Ray 374. Bull. N. P. 14. Holt. 4, 150.

(1) In an action for a malicious prosecution, it is incumbent on the plaintiff to shew that the original suit, wherefore instituted, is at an end. For otherwise he might recover in the action, and afterwards be convicted upon the original suit. Douglas 205. For this purpose he must produce and prove, a copy of the acquittal on record, the substance of the evidence, the charges of acquittal, and the circumstances which shew the prosecution was malicious and without probable cause. Bull. Nisi Prius, 13, 14.

(2) 1 Lev. 62, Also it seems certain, That a man may not only be condemned to the pillory, but also to be branded for a false and malicious accusation, but since it doth not appear to have been solemnly resolved, that such an offender is indictable upon the statute, it seems to be more safe and adviseable to ground an indictment of this kind upon the common-law, than upon the statute, since there can be no doubt, but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate (d) together by indirect means to impoverish a third person, or (e) or falsely and maliciously to charge a man with being the reputed father of (f) a bastard child, or to maintain one another in any matter, whether it be true or false. (2)

226.
1 Sid. 174.
1 Keble 350.
(e) 1 Lev. 62.
1 Mod. 185,
186.
1 Sid. 68.
1 Keble 254.
(f) 27 Aff. 44.
9 Co. 56.
3 R. Abr. 77.
See Moor 788.
Salkeld 174.
1 Ventris 303,
304.
6 Mod. 185.
8 Mod. 320.
11 Mod. 55.
Carth. 416. Foster 221.

(2) Journeymen confederating and refusing to work unless for certain wages may be indicted for a conspiracy, notwithstanding the statutes which regulate their work and wages do not direct this mode of prosecution, for the offence consists in the conspiring, and not in the refusal, and all conspiracies are illegal although the subject matter of them may be lawful.--- Vide the case of the Tub-women v. the London Brewers. 2 Mod. 11. 320. So also a bare conspiracy to do a lawful act to an unlawful end is a crime, although no act be done in consequence thereof. 2 Mod. 321. And the fact of conspiring need not be proved on the trial, but may be collected by the jury from collateral circumstances. 1 Black. Rep. 392. Strange 144. And if the parties concur in doing the act, although they were not previously acquainted with each other, it is conspiracy. Lord Mansfield in the case of the prisoners in the King's Bench. Hillary Term. 26 Geo. 3.

Sec. 3. Neither doth it seem to be any justification of a confederacy to carry on a false and malicious prosecution, That the indictment or appeal, which was preferred, or intended to be preferred, in pursuance of it, was (g) insufficient, or that the court wherein the prosecution was carried on, or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was in truth in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy

(g) Palm. 45.
3 Keble 141.
Style 157.
1 R. Abr. 120.
9 Coke 26.
Yelv. 46, 217.
C. Eliz. 563.
2 Bull. 270, 271.
Cro. Jac. 357.
3 109.

racy

racy is formed, may perhaps be inconsiderable; (b) yet the association to pervert the law in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law.

Con. 2 Keb. 881. W. Jones 94. 2 Cr. 130. Vide the case of the King v. Risal.

(b) Reg. 134.
F. N. B. 116.
3 Affix 13.
11 H. 7. 25, 26.
1 R. Abr. 132.
2 Mod. 52, 326.
1 Black.

Sec. 4. Neither (a) is it any plea for one who is prosecuted for such an unlawful confederacy, That nothing more was intended by him, but only to give his testimony in a legal course of justice against the party to whose prejudice such confederacy is supposed to have been formed; for notwithstanding it may be said, That it would be a great discouragement to legal proceedings to make persons liable to a criminal prosecution, for barely intending to give their evidence, and it would be a pre-judging of a cause to try the truth of the testimony intended to be given in it before the cause itself is determined; yet the law will rather venture this mischief, than suffer so flagrant a villainy to go unpunished. However if there be any probability, That the principal cause will ever be tried, it seems proper to apply to the court to stay the trial of the confederacy till the merits of the principal cause be determined.

(a) 9 Co. 55.
56, 57.
12 Co. 23, 90.
91, 92.
C. Eliz. 70, 71.
134.
1 Leon. 107.
1 R. Abr. 113.
114, 115.
Winch. 28, 54.
Lath 79, 80.
Con. 1 R. Abr.
10.
F. N. B. 115.
27 H. 8. 2.

Sec. 5. Yet (b) it seems to be certain, That no one is liable to any prosecution whatsoever, in respect of any verdict given by him in a criminal matter, either upon a grand or petit jury. For since the safety of the innocent, and punishment of the guilty, doth so much depend upon the fair and upright proceeding of jurors, it is of the utmost consequence, that they should be as little as possible under the influence of any passion whatsoever. And therefore, lest they should be biased with the fear of being harassed by a vexatious suit, for acting according to their consciences, (the danger of which might easily be insinuated, where powerful men are warmly engaged in a cause, and thoroughly prepossessed of the justice of the side which they espouse) the law will not leave any possibility for a prosecution of this kind.

(b) 27 Aff. 77.
27 Aff. 12.
9 H. 6. 44.
Bridg. 130, 132.
21 E. 3. 17.
47 E. 3. 87.
12 Co. 23, 24.
Reg. 134.
F. N. B. 115.
27 H. 8. 2.
S. P. C. 172.
173.
L. Ray. 469.
12 Co. 23, 24.
Vaugh. 135.

It is true indeed, the jurors were formerly sometimes questioned in the Star-Chamber, for their partiality in finding a manifest offender not guilty; but this was always thought a very great grievance; and surely as the law is now settled by Bushel's case, there is no kind of proceeding against jurors in respect of their verdicts in criminal matters allowed of at this day. As to the objection, That an attain lies against a jury for a false verdict in a *civil cause*, and that there is as much reason to allow of it in a criminal one, it may be answered, That in an attain, a man's property is only brought into question

F. N. B. 105.
106.

a second

a second time, and not his liberty or life; and also it may be generally presumed, That a jury is likely to be equally influenced with the fear of an attain from either of the contending parties, whereas if any such examinations of their proceedings were allowed in criminal causes they might be often in great danger of one side, by incurring the resentment of a powerful prosecutor, and provoking him to call their conduct into question for their supposed partiality; but they could have little to fear from an injured criminal who would seldom be in circumstances to make his prosecution formidable.

12 Colk 24.
See Vaughn 138,
139.
12 Ed. 4.

S. P. C.

§. 2. 6. And as the law has exempted jurors from the danger of incurring any punishment in respect of their verdict in criminal causes, it hath also freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for any thing done by them openly in such courts as judges. For the authority of a government cannot be maintained, unless the greatest credit be given to those who are so highly intrusted with the administration of publick justice; and it would be impossible for them to keep up the people that veneration of their persons, and submission to their judgments, without which it is impossible to execute the laws with vigour and success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured. Yet if a judge will so far forget the dignity and honour of his post, as to turn solicitor in a cause which he is to judge, and privately and extrajudicially tamper with witnesses, or labour jurors, he hath no reason to complain, if he be dealt with according to the same capacity, to which he so basely degrades himself.

12 Colk 24.

P. C. 17.

§. 2. 7. It appears not only from the words of the statute, but also from the plain reason of the thing, That no conspiracy whatsoever to maintain a suit can come within the danger of the statute, unless it be both false and malicious. For it would be a most dangerous discouragement of all legal prosecutions, if those who engage in them upon a probable ground, should be in danger of being found guilty of so heinous a crime upon their not being able to bring their suits to their intended effect. And from hence it clearly follows, That if the defendants to an indictment or appeal in murder be found guilty of homicide *se defendendo*, or by misadventure, or get off by pleading the king's pardon, their prosecutors are in no danger of being punished as conspirators. And from the same ground it also follows, That if the defendants in a writ of conspiracy can shew a probable cause of suspicion, they shall be discharged; as where being accused of a conspiracy for indicting a person of larceny, they can shew

shew that a larceny was committed at such a time and place, and that the party charged by them for such larceny was found by them at the same time and place, with suspicious circumstances; or where persons being charged with a conspiracy for indicting another for feloniously carrying away a woman with great violence, and numbers are able to prove that they saw the persons whom they so accused riding armed in a warlike manner, and following after those who in truth actually did the felony, and that it was the common report of the country that they were all of the company. But some have said, That there is a necessity to plead such matter specially, and that it cannot be given in evidence on the general issue.

1 Leon. 107.
C. Eliz. 134.
Kelw. 81, 83.
20 H. 7. 11.

20 H. 7. 11.
Kelw. 81.
C. Eliz. 134.
1 Leon. 107.

Sec. 8. It plainly appears from the words of the statute, 'That one person alone cannot be guilty of conspiracy within the purport of it; from whence it follows, That if all the defendants who are prosecuted for such a conspiracy be acquitted but one, the (a) acquittal of the rest is the acquittal of that one also. Also upon the same ground it hath been holden, That no such prosecution is maintainable against a (b) husband and wife only, because they are esteemed but one person in law, and are presumed to have but one will.

12 Mod. 228,
(a) 8 H. 4. 6.
21 Aff. 12.
S. P. C. 175,
C. 112. 701.
5 Mod. 227,
1 R. Abr. 111,
(b) 3 Ed. 3. 4.
S. P. C. 174.

But it is certain, That an action on the (c) case in the nature of a conspiracy may be brought against one (d) it hath been resolved, That if such an action brought against several persons, and all but one be acquitted, yet judgment may be given against that one.

416.

116.

(d) 1 R. Abr. 111. 11
407. 511. 124. 103.
Boulton v. P. 14.

6 Mod. 170. 151.
216. 5 Mo.

2-b.
209.

Sec. 9. As to the second point, viz. In what manner offenders of this nature are to be punished, it is clear, That those who are convicted of conspiracy at the suit of the (e) party shall only have judgment of fine and imprisonment, and to render to the plaintiff his damages. Also it is certain, that he who is convicted at the suit of the (f) king, of a conspiracy to accuse another of a matter which may touch his life, shall have judgment that he shall lose the freedom and franchise of the law, (whereby he is disabled to be put upon any jury, or to be sworn as a witness, or even to appear in person in any of the king's courts;) and also that his houses, lands, and goods, shall be seized in the king's hands, and his houses and lands stripped and wasted, his trees rooted up and rated, and his body imprisoned. And this is commonly called a villainous judgment, and is given by the common law, and not by any statute, as is said generally in some (g) books,

3 Inst.
1. 1.
S. P. C.
27. Aff.
Cant.

27 Aff. 59.
S. P. C. 175.
46 Aff. 11.
Burr. 1027.
Strange 196.

to be the proper judgment upon every conviction of conspiracy at the suit of the king, without any restriction to such as endangered the life of the party. But I do not find this point any where settled. (3)

(3) There has been no instance of the villainous judgment since the reign of Edward the Third. The usual mode of punishment at present is by pillory, fine, imprisonment, and surety for the good behaviour. Burr. 996, 1027. Str. 196. Crown Cir. 208. The quarter sessions have jurisdiction over this offence. Finch 80. 8 Mod. 321. And on motion in arrest of judgment the defendant must be personally present in court. Strange 1227. Burr. 931.

CHAPTER THE SEVENTY-THIRD.

OF LIBELS.

See 3 Inst. 174
9 Co. 53, 59.
Moor 813, 627.
March 131.
4 Co. 14.
Popham 133,
139. Selden tit. libels. 1 Ventris 31. Hob. 253. Carth. 405. 1 Salk. 211. Fitzgib.
221, 253. 2 Wilson 403 2 Burr. 980.

N treating of Libels I shall consider; First, What shall be said to be a libel. Secondly, Who are liable to be punished for it. Thirdly, In what manner they are to be punished.

6 Coke 125.
5 Mod. 165,
166, 167.
Salk. 418.
Str. 422, 791.
12 Mod. 221.
Ld. Ray 416.
12 Mod. 2193.

Self. 1. As to the first point it seemeth, That a libel in a strict sense is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and expose him to publick hatred, contempt or ridicule.

6 Coke 125.
Skin. 123, 124.
Salkeld 418.
Ld. Ray 437.
3 Kcb. 378.

Self. 2. But it is said, That in a larger sense the notion of a libel may be applied to any defamation whatsoever, expressed either by signs or pictures, as by fixing up a gallows against a man's door, or by painting him in a shameful and ignominious manner.

1 Lev. 139.
5 Coke 125.
12 Coke 35.
Raymond 201.
Stra. 422, 898.
Savil 49.
Salk. 49, 418.
1 Sid. 270, 271.
3 Inst. 174.

Self. 3. And since the chief cause for which the law so severely punishes all offences of this nature, is the direct tendency of them to a breach of publick peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would be impossible to restrain by the severest laws, were there no redress from publick justice for injuries of this kind, which of all others are most sensibly felt; and since the plain meaning of such scandal as is expressed by signs or pictures, is as obvious to common sense, and as easily understood by every common capacity, and altogether as provoking, as that which is expressed by writing or printing, why should it not be equally criminal?

Sect. 4. And from the same ground it seemeth clearly to follow, That such scandal as is expressed in a scoffing and ironical manner, makes a writing as properly a libel, as that which is expressed in direct terms; as where a writing in a taunting manner reckoning up several acts of publick charity done by one, says, "You will not play the Jew, nor the hypocrite," and so goes on in a strain of ridicule to insinuate, that what he did was owing to his vain-glory; or where a writing, pretending to recommend to one the characters of several great men for his imitation, instead of taking notice of what they are generally esteemed famous for, pitched on such qualities only which their enemies charge them with the want of; as by proposing such a one to be imitated for his courage, who is known to be a great statesman but no soldier; and another to be imitated for his learning, who is known to be a great general, but no scholar, &c. which kind of writing is as well understood to mean only to upbraid the parties with the want of these qualities, as if it had directly and expressly done so.

Hobart 225.
Norham 239.
2 Will. n. 163.
2 Burrow 980.
2 Modern 219.
4 Modern 86.
4 Read. Stat.
Law 151.
Barn. 305, 289.
Sess. Cases 301.
Popham 252.
Hobart 225.
Kemble 293.
Moore 627.
R. Abr. 17.
F
2 Strange 898.

Sect. 5. And from the same foundation it hath also been resolved, (a) That a defamatory writing expressing only one or two letters of a name, in such a manner, that from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel, as if it had expressed the whole name at large; for it brings the utmost contempt upon the law, to suffer its justice to be eluded by such trifling evasions: and it is a ridiculous absurdity to say, That a writing which is understood (b) by every the meanest capacity, cannot possibly be understood by a judge and jury.

(a) Hunt's Case.
Tinn. 12.
Anno.
3 Modern 68.
12 Modern 139.
Ld. Raym. 879.

It should by affidavit state the having read the libel, and that he understands and believes it to be so. Note in 3 Bac. Abr. 493.

(b) On application for an injunction, the friend to the party complain-

Sect. 6. And from the same ground it farther doth appear, That it is far from being a justification of a libel, that the contents thereof are true, (1) or that the person upon whom it is made, had a bad reputation, since the greater appearance there is of truth in any malicious invective, so much the more provoking it is.

5 Coke 125.
Hobart 255.
Moore 627.
2 Strange 298.
3 Popham 295.
9 St. Tr. 275.

(1) In an action, the truth of a libel may be pleaded in justification. Hob. 255. And even on a motion for an injunction, the truth or falsehood of the libellous matter will commonly determine the court either to refuse or to grant it. Stra. 498. An affidavit thereto, except in particular cases, is always required from the party applying, stating positively and distinctly that the contents of the imputed libel are not true. Dougl. 282, 388. Or the court will leave the injury to be remedied in the ordinary course of justice by action or indictment. Stra. 273.—But the court will not grant this extraordinary remedy by information, nor should a grand jury find an indictment, unless the offence be of such flagrant enormity that it may reasonably be countenanced.

have a tendency to disturb the peace and harmony of the community. In such a case the libel are justly placed in the character of an offended prosecutor, to vindicate the common right of the public, though violated only in the person of an individual; for the malicious publication of even a single libel cannot in true policy be suffered, to interrupt the tranquillity of any well ordered society.—This is a principle so rational and pure that it cannot be tainted by the vulgar odium which has accompanied the derivation of the doctrine from the tyranny of the Star-Chamber; adoption of it by the worst of courts can never weaken its authority, and without it all the rights of society might with impunity be hourly endangered or destroyed.—Vide Law of

1 Coke 125.
1 Sid. 210, 2
1 Inst. 174.
10. Car. 1;
504.
1 Roll. 86.
1 Mod. 139
Comb. 65.
Curth. 15.
Hurd. 470.
Skin. 123.
Keb. 773.
St. Tr. 297

Sec. 7. Nor can there be any doubt but that a writing which defames private persons only, is as much a libel as that which defames persons intrusted with a publick capacity, inasmuch as it manifestly tends to create ill blood, and to cause a disturbance of the publick peace. However it is certain, That it is a very high aggravation of a libel that it tends to scandalize the government, by reflecting on those who are intrusted with the administration of publick affairs, which doth not only endanger the publick peace, as all other libels do, by stirring up the parties immediately concerned in it to acts of revenge, but also has a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition.

(c) Har. 470

1 Id. 414, 415
1 Summ.
2 Keb.
(1) 4 C.
(1) Dyer
1 Inst. 2
Bull. N.

Sec. 8. But it hath been resolved, That no false or scandalous matter contained in (a) petition to a committee of parliament, or in (b) articles of the peace exhibited to justices of peace, or in any other (c) proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to publick prosecutions, in respect of their applications to a court of justice. And the chief intention of the law in prohibiting persons to revenge themselves by libels, or any other private manner, is to restrain them from endeavouring to make themselves their own judges, and to oblige them to refer the decision of their grievances to those whom the law has appointed to determine them. Also (d) it seemeth to have been holden by some, That no want of jurisdiction in the court, to which such a complaint shall be exhibited, will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel. Yet if it shall manifestly appear from the whole circumstances of the case, That a prosecution is intirely false, malicious, and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the shew of a legal proceeding; I cannot see any reason why such a mockery of publick justice should not rather aggravate the offence, than make it cease to be one, and make such scandal a good ground of an indictment at the suit of the king; as it makes the malice of their proceeding a good foundation of an action on the case at the suit of the party, whether the court had a jurisdiction of the cause or not. But it is said, that no presentment

Moss 143, 705;
820.
Popham 152.
Con. 4 Co. 14.
4 Com Dig. 152
Dyer 285.
Y. version 11.
2 H. 11. 269.
Godbolt 340.
Pain 145, 180.
V. 23
12 Coke 103.
2 Mod. 119.
2 Anderson 28.

presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence any way to discourage them from making their inquiries with that freedom and readiness which the publick good requires. For which considerations, it seems reasonable to exempt them from the fear of any kind of prosecution in respect of their inquiries, as has been shewn more at large in the chapter of conspiracy.

Sec. 9. However it seems clear, That no writing whatsoever is to be esteemed a libel, unless it reflect upon some particular person; and it seems, That a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard it agreed in the Court of King's Bench; (2) yet it seems, That the author may be bound to his good behaviour, as a scandalous person of evil fame.

Bar. K. B. 138, 166. See the Chapter concerning Surety for the good Behaviour.

(2) It was so agreed in Read's case, 11 Mod. 242; But in the case of the King v. Curl, Mich. 15 Geo. 2. for publishing an obscene book, the Court were unanimous, that it is a temporal offence, and that Read's case was not law. Stra. 783, 834. Vide also 4 Burr. 2527.

Sec. 10. As to the second point, viz. Who are liable to be punished for a libel, it is certain that not only he who composes, or procures another to compose it, but also that he who publishes, or procures another to publish it, are in danger of being punished for it; and it is said, not to be material whether he who disperses a libel knew any thing of the contents or effect of it or not; for nothing could be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him (3) safe in dispersing them. Also it hath been said, That if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it, in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. Also it hath been holden, That the copying of a libel shall be a conclusive evidence of the publication of it, unless the party can prove that he delivered it to a magistrate to examine it, in which case the act subse-

See 1 Dant.
Abr. 208, 209,
210, 211. and
the foregoing
Chapter of
Conspiracy.

Moore 627.

Kely 248.
Salk. 224.
Ld. Ray. 480.
4 Read S. L.
151.
Fortesc. 98.
Sess. Ca. 29.
12 Mod. 139.
118, 290.
L. Ray. 879.
2 Strange 934.
1 Vent. 10, 16.

Almon's case.
5 Bur. 2666.
9 Co. 59.
Moore 267, 627,
813.
Strange 77.
Bridl. N. P. 6.
Fitzgibbon 47.
Com. 9 Co. 59.
L. Ray. 414,
419, 729.
4 Com. Dig.
152. B. 2.
5 Co. 125.
12 Co. 35.
Combs. 339.
5 Mod. 167,
163.
Vide Salk. 417,
418, 419, 646,
281.
Carthew 403 to
410.

(3) But if a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him. Woodfall's case, Essay on Libels. p. 19. See. Vide Salmon's case, B. R. Hilary 1777, and Rex v. Almon. 5 Burr. 2687.

quent is said to explain the intention precedent. But it seems to be the better opinion, That he who first writes a libel dictated by another, is thereby guilty of making it, and consequently punishable for the bare writing; for it was no libel till it was reduced to writing.

(a) 1 Keb. 951.
2 Keb. 261, 53.
L. Ray. 341.
417. 36.
Skim. 123.
62 Mod. 218.
11 Mod. 99.
3 Bac. Ab. 398.
1 Lev. 159.
240.
12 Co. 34.
Pop. 139, 136.
Ray 261. 1 Sid. 444.
(b) 5 Mod. 167. 5
Barn. 306. Self. Ca

Self. 11. Also it hath been resolved, (a) That the sending of a letter full of provoking language to another, without publishing it, is highly punishable; and if the bare making of a libel be an offence, whether it be published or not, as it seemeth to be holden in some (b) books, surely the sending of it to the party reflected upon, must be a much greater crime, inasmuch as it so manifestly tends to a disturbance of the peace.

Hob. 62. 3 In. 174. 4 Inst. 186. 181.
12 Co. Sec 11. 12 Vin Ab. 229.

Keb. 832.
1 Saund. 153

Self. 12. Also it seems to be agreed, That he who delivers a paper full of reflections on any person, in nature of a petition to a Committee of Parliament, to any other person except the Members of Parliament, may be punished as the publisher of a libel, in respect of such a dispersing thereof among those who have nothing to do with it.

(c) 9 Co. 59.
Moore 213.

(d) 9
Moore
(e) Moore 627.
1 V.
2 Ke
Salk
Carrl

Self. 13. But it hath been resolved, That he who barely reads a libel in the presence (c) of another, without knowing it before to be a libel, or who hearing a libel read by another (d) laughs at it, or who (e) barely says, That such a libel is made upon such a person, whether he speak it with or without malice, or who is only proved to have had a libel in his custody, shall not in respect of any such act be adjudged the publisher of it. But the having in one's custody a written copy of a libel publickly known, is an evidence of the publication of it.

Moore 627.
9 Co 59.

Self. 14. Also it hath been holden, That he who repeats part of a libel in merriment without malice, and with no purpose of defamation, is no way punishable; but it seemeth, That the reasonableness of this opinion may justly be questioned; for jests of this kind are not to be endured, and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

35 Vin. Ab. 88
2 Keb. 737.
1 Saund. 133.
3 Levins. 240.
1 Self. 147, 145
Skim. 124.
Hatch 450.

Self. 15. But it seemeth to be settled, that the bare printing of a petition to a committee of parliament (which would be a libel against the party complained of, if it were made for any other purpose, than as a complaint in a course of justice)

and

and delivering copies thereof to the members of the committee, shall not be looked upon as the publication of a libel, inasmuch as it is justified by the order and course of proceedings in parliament, whereof the King's Courts will take judicial notice.

Sec. 16. As to the third point; viz. In what manner offenders of this kind are to be punished, there seemeth to be no doubt, but that they may be condemned to pay such fine, and also to suffer such corporal punishment, as to the court in discretion shall seem proper, according to the heinousness of the crime, and the circumstances of the offender.

*Cro. Car. 175.
5th 4.
3 Inst. 174.
2 Inst. 223.
1st Co.
5th 4. 934.
1st 8.
Foster. 37, 201*

CHAPTER THE SEVENTY-FOURTH.

OF THE OFFENCE OF KEEPING A BAWDY-HOUSE,

O R

† AN UNLICENSED PLACE OF ENTERTAINMENT.

THE offence of keeping a bawdy house being of so gross a nature, and there being also few questions relating to it worth considering, I shall pass it over with these following observations. First, That it comes under the cognizance of the temporal law, as a common nuisance, not only in respect of its endangering the publick peace, by drawing together dissolute and debauched persons, but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. Secondly, That a feme-covert is punishable for this offence (1) as much as if she were sole, as more fully hath been shewn, Chapter the first, Section twelve. Thirdly, That a lodger who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house; but that the bare solicitation of chastity is not indictable. Fourthly, That offenders of this kind are punishable not only with fine and imprisonment, but also with such infamous punishment as to the court in discretion, shall seem proper.

*2 Rol. 39. 79.
37.
4 Black. Com.
4. 167.
n. 95.
1 Law.
Kitchen 11.
3 Inst. 205.
Salk. 482.
2 Ld. Ray. 1197.
Dart.
Popin.
1 Sid. 163, 410.
2 B. R.
Salk.
10 Me*

(1) Therefore she may have an act in saying that she keeps a bawdy-house.
Sayer 33.

† *Sec. 2.* As to the offence of keeping an unlicensed house. It is enacted by 25 Geo. 2. c. 36. made perpetual by 28 Geo.

Publick places
within 20 miles
of the metro-
polis must be
licenced.

2. c. 19. " That any house, room, garden, or other place kept for publick dancing, musick, or other publick entertainment of the like kind within the cities of *London* and *Westminster*, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas quarter sessions of the peace, for the county or place, in which such house, room, garden or other place is situate, as the justices in their discretion shall think fit, signified under the hands and seals of four or more of the justices there assembled, shall be deemed a disorderly house or place."

The form of
such licence.

† *Sec.* 3. And it is further enacted, " That every such licence shall be signed and sealed by the said justices in open court, and afterwards be publickly read by the clerk of the peace, together with the names of the justices subscribing the same; and no such licence shall be granted at any adjourned sessions; nor shall any fee or reward be taken for any such licence. And it shall be lawful for any constable or other person authorized by warrant, by a justice of the county or place where such house or place shall be situate, to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with according to law. And every person keeping such house, room, garden, or other place, without licence as aforesaid, shall forfeit one hundred pounds to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses."

licenced are to
be distinguished.

† *Sec.* 4. And it is further enacted, " That there shall be affixed and kept up in some notorious place over the door or entrance of every such house or other place, so licenced as aforesaid, an inscription in large capital letters, in the words following. LICENCED PURSUANT TO ACT OF PARLIAMENT OF THE TWENTY-FIFTH OF KING GEORGE THE SECOND; and that no such house, room, garden, or other place, kept for any of the said purposes, although licenced as aforesaid, shall be open for any of the said purposes before five in the afternoon, and that these restrictions shall be inserted in and made condition of the licence, which shall be forfeited on the breach thereof, and revoked by the next general or quarter session, and not be renewed; nor shall any new licence be granted to the same person or persons, or any other person on his or their or any of their behalf, or for their use or benefit, directly or indirectly, for keeping any such house, room, garden, or other place, for any of the purposes aforesaid."

N B. This act
shall not extend
to the theatres
royal, nor to any
publick enter-
tainments au-
thorized by let-
ters patent from
the crown or
licence from the
Lord Chamber-
lain. *Sect.* 6.

† *Sec.* 5. And it is enacted by par. 5. " That, in order to encourage prosecutions against persons keeping bawdy-
houses,

“ houses, gaming-houses, or other disorderly houses, if any two inhabitants of any parish or place paying scot and lot therein, do give notice in writing to the constable, or where there is no constable, to any other peace officer of such parish or place of the like nature, of any person keeping a bawdy-house, gaming-house, or other disorderly house within the parish or place, he shall forthwith go, with such inhabitants to a justice of the county or place, and upon such inhabitants making oath before such justice that they believe the contents of such notice are true, and entering into a recognizance of 20l. each to give material evidence against the offender, he the said constable shall enter into a recognizance of 30l. to prosecute such suit with effect at the next sessions or assizes for the county, as to such justice shall seem meet. And such constable or other officer shall be allowed his reasonable expences, to be ascertained by two justices, and paid by the overseers. And in case the offender shall be convicted, the owners shall immediately pay ten pound to each of the inhabitants, on pain of forfeiting in each case double the sum. And if the constable shall neglect his duty he shall forfeit 20l.

The mode of
prosecution.

† *Stat.* 6. And it is further enacted by par. 6. “ That upon such constable or other officer entering into such recognizance to prosecute as aforesaid, the said justice shall, by warrant, bring the person accused before him, and bind him over to appear at the session or assizes as aforesaid, and if he thinks fit, may likewise demand and take security for such person’s good behaviour in the mean time.

Justices may
summon the
party, &c.

† *Stat.* 7. And it is further enacted, par. 8. “ That every person who shall appear, act, or behave, as having the care and management of any such house, shall be deemed the keeper of the same, and liable to be punished as the master or mistress, although not in fact the real owner or keeper thereof. Inhabitants may be witnesses. The indictment not removeable by *certiorari*.”

Who shall be
deemed keepers
of public
places.

CHAPTER THE SEVENTY-FIFTH.

OF COMMON NUSANCES.

OFFENCES under the degree of capital, more immediately against the subject; not amounting to an actual disturbance of the peace, which may be committed by private persons without any relation to an office, and which are of an inferior nature to the six kinds of offences last treated of, being neither infamous nor grossly scandalous, seem to be reducible to the following heads; First, Such as more immediately affect the publick. Secondly, such as more immediately affect the interests of particular persons.

Offences of this kind, more immediately affecting the publick, are four-fold; viz. Common nuisances. Monopolies. Forestalling, ingrossing, and regrating. And Barratry.

And first of common nuisances. For the better understanding whereof I shall first consider them in general, and then descend to those relating to highways and publick houses, which seem to be the most remarkable general heads of this offence.

As to common nuisances in general I shall consider, *First*, What shall be said to be a common nuisance. *Secondly*, How it may be removed. *Thirdly*, How it may be punished.

2 R. Abr. 83. *Sec. 1.* As to the first point it seems, That a common nuisance may be defined to be an offence against the publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.

1 R. Abr. 83. Co. Litt. p. 56. *Sec. 2.* But annoyances to the interest of particular persons are not punishable by a publick prosecution as common nuisances, but are left to be redressed by the private actions of the parties aggrieved by them

1 Sid. 209. Sayer 169.

Sec. 3. And from hence it clearly follows, That no indictment for a nuisance can be good, which lays it to the damage of private persons only; as where it accuses a man of
(a) fur-

(a) furcharging such a common; or of (b) inclosing such a piece of ground, wherein the inhabitants of such a town have a right of common, to the nuisance of all the inhabitants of such a town; or of disturbing a (c) water-course running to the mill of *J. S. ad grave damnum J. S. & tenentium suorum*, without saying *omnium ligeorum Domini Regis*; or of doing a nuisance to a thing no way appearing to be of a publick nature, *ad grave (d) damnum*, or (e) *detrimentum*, or (f) *commune nocumentum omnium ligeorum Domini Regis prope inhabitantium*; yet it hath been resolved, that an indictment for not repairing a bridge by reason whereof it was ruinous, *ita quod ligei Domini Regis per eam transire non possunt*, and concluding, *ad nocumentum eorundem*, is good without using the words *ad nocumentum omnium ligeorum*, &c. for by the king's liege people shall be understood, all his liege people.

Sett. 4. Also it is said, That the law hath so tender a regard for the interest of the king and of religion, That an indictment for doing a thing which plainly appears immediately to tend to the prejudice of either of them, is good, though it does not expressly complain of it as a common grievance; and upon this ground it hath been resolved, That an indictment for converting the king's money to one's own use is good, without more. And upon the same foundation also it hath been holden, That an indictment for breaking and digging up the wall of the church of such a town, *ad nocumentum burgi ligeorum Domini Regis* is good.

Sett. 5. Also it hath been said, That an indictment of a common scold, by the words *communis rixatrix*, which seem to be precisely necessary in every indictment of this kind, is good, though it conclude *ad commune nocumentum diversorum* instead of *omnium*, &c. perhaps for this reason, because a common scold cannot but be a common nuisance. And upon the like ground it seems that it may probably be argued, That an indictment for laying logs in the stream of a navigable publick river, *ad nocumentum J. S.* may be maintained, because, it cannot but be a common nuisance. And if the law be so in this case, why should not also an indictment setting forth a nuisance to a way; and expressly and unexceptionably shewing it to be a highway, be good, notwithstanding it conclude *in nocumentum diversorum ligeorum*, &c. without saying *omnium*; for why should such a conclusion be more necessary in an indictment for one kind of nuisance than for any other? And perhaps the (g) authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment, it did not appear with sufficient certainty, whether the way, wherein the nuisance was alledged,

were

(a) 2 R. Ab. 83.
1 Burr. 259.
6 Modern 453.
2 Wilson 57.
(b) 27 Aff. 6.
2 R. Abr. 83.
C. Eliz. 90.
(c) 2 R. Ab. 83.
1 Ventr. 26.
(d) 2 R. Ab. 83.
(e) 1 Mod. 107.
(f) 1 Roll. 406.
3 Keb. 28, 284.
C. Eliz. 414.
C. Jac. 382.
1 Saund. 135.
C. Eliz. 148.
2 K. ble 461.
2 Leon 183, 184.
9 Coke 113.
1 Ventris 208.

27 A.T. 19, 20.
2 K. Abr. 83,
84.

6 Mod. 11, 173,
213, 229, 311.
Moor 847.
Str. 849, 1247.
Bar. K. R. 220.
2 Sess. Caf. 20.
2 Keble 410.
1 K. ble 161.
12 Mod. 504,
615.
1 Roll. 271.
Sayer 107, 301.

(g) C. Eliz. 143.
2 Keble 461.
2 R. Abr. 83.
Latch. 183.

were a highway, or only a private way; and therefore that it shall be intended from the conclusion of the indictment that it was a private way.

1 Inst. 205.
Kitchen 11.
2 Barr. 1232.
1 Modern 76.
2 Keble 846.
3 Keble 464.
5 Modern 142.
1 Vent. 169.
10 Mod. 336.
12 Mod. 342.

Sett. 6. There is no doubt but that common bawdy-houses are indictable as common nuisances; also it hath been said, that all common stages for rope-dancers, and also all common gaming-houses, are nuisances in the eye of the law, as hath been more fully shewn in the foregoing chapter; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood.

1 Roll 109.
5 Mod. 142.
See Rushworth's
Coll. Part 2.
Vol. 1. fol. 220,
247. Skin. 625
to 630.

N. B. For the
offence of acting
plays without
licence Vide
infra ch. 87,

Sett. 7. Also it hath been holden, That a common play-house may be a nuisance, if it draw together such numbers of coaches or people, &c. as prove generally inconvenient to the places adjacent; and it seems to be a proper distinction between play-houses and the nuisances mentioned in the foregoing section. That play-houses having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident, where-as the others cannot but be nuisances.

(a) 2 R. Abr.
138, 139. 265.
2 Roll 4, 30.
C. Jac. 382,
491.
Moor 238.
1 Roll 136, 202.
Poph. 143.
Con. 5. Co. 101.
(b) F. N. B. 2.
c.
(c) 16 E. 4. 7 b.
Godb. 259.
(d) Quere Moor
580, & 621.
C. Eliz. 548.

N. B. For the
nuisance of keep-
ing pigeons, vide
1 Jac. 1. c. 27.
and 2 Geo. 3.
c. 29,

Sett. 8. It hath been resolved, That neither an old nor a new (a) dovecote, whether it were erected by the lord of a manor, or one of his tenants, is a common nuisance; for if a dovecote were a common nuisance, it could never become lawful by any licence or prescription whatsoever, because every nuisance is a *malum in se*; but it is certain, that a dove-house may be justified by a prescription, and that it is so far countenanced by the law, as to be (b) demandable in a *præcipe* before any land whatsoever which is not built upon, and that the owner may justify the taking another's (c) hawk, which he shall find at his dove-house, flying at his pigeons; (d) and from hence it seems clearly to follow, That though a tenant, who builds a dove-house without the licence of the lord of the manor, may perhaps be liable to an action on the case at the suit of such lord, whose prerogative is said to be incroached upon by the erecting such a house without his licence, yet he cannot be punished for it by a publick prosecution.

1 Jon. 221.
C. Car. 184.
1 Bull. 203.
2 R. Abr. 137.
Kit. 11, 25.
St. 18 Ed. 2.

Sett. 9. But perhaps it may be argued, That if this reasoning be good, it will follow from the same ground, That a gate erected in a highway will be also no nuisance; because if it were, it could not be justified by any prescription, as it is agreed that it may be; but to this it may be answered, That the erecting of such a gate is therefore a nuisance because it interrupts the people in that free and open passage which they before enjoyed, and

and were lawfully intitled to; but where such a gate has continued time out of mind, it shall be intended, That it was set up at first by consent, on a composition with the owner of the land on the laying out the road, in which case the people had never any right to a freer passage than what they still enjoy.

Secd. 10. It hath been holden, That it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended to be necessary to make them in a town; and surely the trade of a brewer is as necessary as that of a chandler; and yet it seems to be agreed, That a brew-house, erected in such an inconvenient place, wherein the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance: and so in the like case may a glass-house or swine-yard,

2 R. Abr. 139.
Cont. 3 Mod.
138.
Cro. Car. 500.
Morley and
Pragnell,
1 Bur. 336.
2 Keb. 500.
Vide 1 Danv.
173, 174.
Salk. 458, 460.
Hutt. 136.
Palmer 536.
Ventris 26.
2 Ld. Ray. 1163

Secd. 11. It seems certain, That it is a common nuisance to divert part of a publick navigable river, whereby the current of it is weakened, and made unable to carry vessels of the same burthen, as it could before. Also it hath been holden to be a common nuisance to divide a house in a town for poor people to inhabit in, by reason whereof it will be more dangerous in the time of infection of the plague. (1).

Noy 409.
3 Keb. 640.
750.
11 Modern 3.
Fitz. 179.
2 R. Abr. 139.
1 Lut. 169.

(1) Or to make great nois's in the night with a speaking trumpet to the disturbance of the neighbourhood, Str. 704. Or permitting a house near the highway to continue in a ruinous condition, Salk. 357. Or laying timber in a public river, although the soil on which it is laid belong to the party, provided it obstructs the necessary intercourse, 3 Bac. Ab. 686. Str. 1247. Or to place a floating dock in the river, although beneficial in repairing ships. Surry assizes at Kingston, 1785. Or to travel with a cart on a common pack or horseway, and by plowing it up to render the use of it inconvenient, 6 Mod. 145. Or to put a ship of 300 tons into Billingsgate Dock, for although it is a common dock, it is only for the reception of small vessels freighted with provisions for the London market. 2 Hawk. c. 25. s. 35. Or to manufacture acid spirit of sulphur, vitrol, or aqua fortis in the vicinity of dwelling houses, 1 Burr. 333. Vide also 13 Ed. 1. c. 24. 12 Rich. 2. c. 13. 2 W. & M. s. 2. c. 8. 30 Geo. 2. c. 22. 31 Geo. 2. c. 17. respecting nuisances in the cities of London and Westminster.

But the fears of mankind, however reasonable, will not create a nuisance, therefore it is no nuisance to erect a building for the purposes of inoculation. 3 Atkyns 21. 726. 750. Nor to lay bricks in the river Thames, in the party's own fishery, 3 Burr. 1770. Nor to violate a public law, Black. Rep. 570. Nor to stop up a prospect, 3 Salk. 247. 459. Cro. Eliz. 118. And whether cockery burrows are a nuisance. See 1 Burr. 259. 6 Mod. 453. See also 11 Mod. 7. and 8.

+ It is enacted by 9 & 10 Will. 3. c. 7. " That it shall not be lawful for any person to make or cause to be made, or to sell or utter, or offer or expose to sale any fireworks, or any cases, moulds or implements for making the same, on pain of 5 l. on conviction before one magistrate, on the oath of two witnesses. Or for any person to permit or suffer fireworks to be cast, thrown, or fired from

Of nuisances in making fireworks.

" out

out of or in his, her or their house, lodgings or habitations, or from, out of, or in any part or place thereto belonging or adjoining, into any publick street, highway, road, or passage, on pain of 20*s.* on conviction as aforesaid. Or for any person to cast, throw, or fire, or to be aiding or assisting therein, on pain of 20*s.* and that every such offence is and shall be adjudged a common nuisance."

Of nuisances by erecting lotteries, &c.

† It is also enacted by 10 & 11 Will. 3. c. 17. "That all mischievous games called lotteries, and all other lotteries, are common and publick nuisances; and that all grants, patents and licences for such lotteries or any other lotteries are void and against law; and whoever shall exercise, keep open, shew or expose to be played at, drawn at or thrown at, or shall draw, play or throw at any such lottery or other lotteries either by dice, lots, cards, balls or any other numbers or figures, or any way whatsoever, shall forfeit 50*l.* for every offence, one third to the king, one third to the poor, and the other third, together with double costs, to the party that shall inform and sue for the same, and the parties shall also be prosecuted as common rogues. And whoever shall play throw or draw at any such lotteries shall forfeit 20*l.* in manner aforesaid."

Of publick undertakings

† It is also enacted by 6 Geo. 1. c. 18. s. 19. "That all undertakings, attempts, and projects by publick subscriptions, for adventuring in certain schemes of commerce, tending to the common grievance, of his majesty's subjects or a great number of them, and the receiving and paying of any money upon such subscriptions, &c. and more particularly the presuming to act as a body corporate, or to raise transferrable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making or endeavouring to make use of such charter, for any such other purpose not thereby intended, and all acting or pretending to act under any such obsolete charter, &c. &c. shall be deemed a publick nuisance and nuisances, the offenders made liable to such fines penalties and punishments as are inflicted on a conviction for common and publick nuisances, and moreover to the further pains and penalties of *premunire*."

2 R. Abr. 44.
C. Car. 134.
1 Jon. 221.
11 Mod. 7, 8
Mool. 774.
2 R. Abr. 155
Salkeld 439.

Sec. 12. As to the second point, viz. How a nuisance may be removed; it seemeth to be certain, That any one may pull down or otherwise destroy a common nuisance, as a new gate, or even a new house erected in a highway, &c. for if one whose estate is, or may be, prejudiced by a private nuisance actually erected, as a house hanging over his ground,

or

or stopping his lights, &c. may justify the entering into another's ground, and pulling down and destroying such a nuisance, whether it were erected before or since he came to the estate, surely it cannot but follow *à fortiori*, that any one may lawfully destroy a common nuisance: and as the law is now holden, it seems, that in a plea, justifying the removal of the nuisance, you need not shew that you did as little damage as might be. (a)

Yelverton 142.
Ld. Raym. 264.
5 Coke 101.
9 Coke 54.
Burrows 2116.
1 Roll. 9, 35.
B. Nif. 14.
1 Jon. 221.
Salkeld 458.
(a) Quere, vide
Cooper v. Mar-
shall, 1 Burrow
Strange 680.

259, and Rex v. Pappineau.

SECT. 13. It hath been adjudged, that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it.

37 Aff. 10.
2 R. Abr. 137.

SECT. 14. As to the third point, viz. In what manner common nuisances may be punished. It is said, (b) that a common scold is punishable by being put into the ducking-stool; and there is no doubt, but that whoever is convicted of another nuisance, may be fined and imprisoned. And it is said, That one convicted of a nuisance, done to the king's highway may be commanded by the judgment to remove the nuisance at his own costs; and it seemeth to be reasonable, That those who are convicted of any other common nuisance should also have the like judgment.

(b) 6 Mod. 11,
173, 213.
2 R. Abr. 84.
2 Sess. Caf. 39.
Vide Strange
686 Rex. v.
Pappineau, and
the cases there
cited.

CHAPTER THE SEVENTY-SIXTH.

OF NUSANCES RELATING TO HIGHWAYS.

AND now I am particularly to consider such nuisances as relate to highways, and publick houses. And for the better understanding of those which concern highways I shall consider: Such as relate to highways in general. And Such as relate to bridges in particular.

For the better understanding of nuisances relating to highways in general, I shall examine the following particulars:

1. What shall be said to be a highway.
2. At whose charge and by whom it ought to be repaired.
3. In what manner it is to be enlarged.
4. How the surveyors thereof shall be appointed.
5. How

5. How such surveyors ought to execute their office.
6. What shall be said to be a nuisance to the highway.
7. How such nuisances are to be removed and punished.
8. In what manner those who are charged with any offence relating to the highway, are to be proceeded against.
9. How persons so proceeded against may defend themselves.

As to the first point, viz. What shall be said to be a highway, it is said that there are three kinds of ways: *First*, a footway, which is called in Latin, *iter*. *Secondly*, a pack and prime-way, which is both a horse and foot-way, and called in Latin, *actus*. *Thirdly*, a cart-way, which contains the other two; and also a cart-way, and is called in Latin, *via* or *aditus*, and this is either common to all men, and then it is called, *via regia*, or belongs to some city or town, or private person, and then it is called, *communis strata*.

Co. Lit. 56.

Communis strata and alia via regia are synonymous terms. Str. 44.
20 Modern 383.
Andrews 143.

Palm. 389.

6 Modern 255.
B. R. H. 315.

(a) C. Eliz. 63.

(A) 1 Vent. 208.

2 Keble 178.

3 Keble 26.

6 Modern 255.

(c) 27 Alf. 23.

Fitzh. 270.

2 Com. Dig.

397.

(d) Co. Lit. 56.

5 Ed. 4. 2.

(e) 3 & 4 W. &

M. 12.

4 Burr. 2091.

(f) Kitchen 35.

Palm. 389.

2 Roll. 412.

(g) Moore 181.

Cro. E. 664.

Co. Lit. 56.

27 H. 8. 27.

(h) 1 Vent. 189.

Kitchen 35.

1 Vent. 208.

3 Keble 28.

Ld. Raym. 1174

Salkeld 359.

SecH. 1. It seemeth that any one of the said ways, which is common to all the king's people, whether it lead directly to a market-town, or only from town to town, may properly be called a highway, and that any such cart way may be called the king's highway, and that a nuisance in any of the said ways is punishable by indictment in the court-leet; for indictments for (a) stopping horseways, and (b) footways, have often been allowed, and where others have been quashed, no other reason has been given for it, but that the way was not called a common way or highway; and in (c) books of the best authority, a river common to all men is called a highway; and it is laid (d) down as a general rule, That nuisances to any way common to all men, are inquirable in the leet, and horse-causeys are taken notice of by (e) parliament; and therefore there seems to be no reason why any way leading from village to village, which does not terminate there, but is also a thoroughfare to other towns, may not properly be called a common or highway, or why a nuisance therein should not be indictable, whether it directly leads to a market-town or not; for since such a way lies open to all the king's subjects, a nuisance therein (f) cannot but be a common nuisance, and if it be not punishable by indictment it would not be punishable at all, inasmuch as it (g) seems to be certain, That it is not punishable by action, because if one man might bring his action in respect of the possibility of the damage which he might receive from it, all other men may do the like, which would introduce a multiplicity of actions; and therefore the distinction which is taken in some (h) books concerning this matter, seems to be very reasonable, That every way from town to town may be called a highway, because it is common to all the king's subjects,

subjects, but that a way to a parish-church, or to the common fields of a town, or to a private house, or perhaps to a village which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the king's subjects, but only to some particular persons, each of which, as it seems, may have an action on the case for a nuisance therein." (1)

Co. Lit. 56.

(1) A street built upon a person's own ground, is a dedication of the highway so far only as the publick has occasion for it, viz. for a right of passage, and is not to be understood as a transfer of the absolute possession of the soil. Strange 1004.

Sett. 2. It hath been holden, that if there be a highway in an open field, and the people have used, time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king's subjects ought to have a good passage, and the good passage is the way, and not only the beaten track; from whence it follows, That if such outlets be sown with corn, and the beaten track be foundorous, the king's subjects may justify going upon the corn. (2)

R. Abr. 390.

Cro. Car. 366.
Douglas 746

749.

(2) So if one grants me a way, and afterwards digs trenches in it to my hindrance, I may fill them up again. But if a way which a man has, becomes not passable, or becomes very bad, by the owner of the land tearing it up with his carts, so that the same be filled with water; yet he who has the way cannot dig the ground to let out the water, for he has no interest in the soil. Godb. 52, 53. But in such case he may bring his action against the owner of the land for spoiling the way, or perhaps he may go out of the way, upon the land of the wrongdoer, as near to the bad way as he can. But where a private way is spoiled by those who have right to pass thereon, and not through the default of the owner of the land; it seems that the wrongdoers who have the use and benefit of the way ought to repair it, and not the owner of the soil, unless he is bound thereto by custom or special agreement. 2 Burr. 382. So if I have a private way without a gate, and a gate is hung up, an action lies upon the case, for I have not my way as I had before. Litt. R. 267.

Sett. 3. It seemeth to be agreed, That an ancient highway cannot be changed without the king's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found, That such a change will not be prejudicial to the publick; and it is said, that if one change a highway without such authority, he may stop the new way whenever he pleases; and it seemeth, That the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as in a common highway; but that in an action of trespass brought by the owner of the land against those who shall go over it, they ought to shew especially, by way of excuse, how the old way was obstructed, and the new one set out; also it is said, That the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it.

C. Car. 266,
267.

Vaugh 341.

1 Burr. 465.

Vide Note (3)
infra.C. Car. 267.
Yelv. 141, 142.

C. C. r. 167.
27 A. 1. 93
1 R. A. 3
V. e. l. 117
W. b. d.
Dougl. 745

Sec. 4. However it is certain, That a highway may be changed by the act of God; and therefore it hath been holden, That if a water which has been an ancient highway, by degrees changes its course, and goes over different ground from that whereof it used to run, yet the highway continues in the new channel, in the same manner as in the old. (3).

(3) An owner of land over which there is an open road may inclose it by his own authority, but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. But if he alter or change the road by the legal course of a writ of *ad quod damnum*, he is not obliged to repair the new road, unless the jury impose such a condition upon him, for otherwise it stands just as it did before. Even though it was at first open and should be directed by the jury to be inclosed — And a positive act of parliament for inclosing lands, which vests a power in commissioners to set out new roads, their award is equally strong as to the consequences as a writ of *ad quod damnum*. 1 Burr. 499.

As to the second point, viz. At whose charge, and by whom the highway ought to be repaired, I shall consider, What provision is made by the common law concerning this matter; and, What by statute.

(a) 1 R. Abr.
89.
(b) March 26.
1 Vent. 123
189.
5. n. 144.
5 H. 1. 5.
1 L. K. 11. 72.

Sec. 5. As to the first of these particulars, it seems to be agreed, That of common right, the general charge of repairing all highways lies on the occupiers of the lands in the parish wherein they are; but it is said, That the tenants of the lands adjoining are bound to scowr their ditches, and there is no doubt but particular persons may be burthened with the general charge of repairing the highway in two cases. viz. In respect of an inclosure of the land wherein it lies. And In respect of a prescription.

1 R. Abr. 100
1 C. 1. 16
1 S. 1. 54
1 V. 1. 117
4 H. 1. 166
1 C. 1. 1
1 R. 11. 111

Sec. 6. And first a particular person may be bound to repair a highway in respect of an inclosure; as where the owner of lands not inclosed, next adjoining to the highway, incloses his lands on both sides thereof, in which case he is bound to make a perfect good way, and shall not be excused for making it as good as it was at the time of the inclosure, if it were then any way defective, because, before the inclosure, the people used, when the way was bad, to go for their better passage, over the fields adjoining, out of the common track, which liberty is taken away by the inclosure.

1 Siderfin 464.

Sec. 7. Also it hath been holden, That if one inclose land on one side, which hath been anciently inclosed of the other side, he ought to repair all the way, but that if there be not such an ancient inclosure of the other side, he ought to repair but half that way: and it is said, That where ever one is bound to repair a highway in respect of an inclosure, and

lays

lays it open again as it was before, he shall be freed from the charge of repairing it. (4)

(4) So in writ of *ad quod dampnum*, and inquisition found thereupon, after the person hath done made the road, (and this it is not necessary the whole new road should go through his own soil,) the parishioners ought to keep it in repair, because being discharged from the repairing of the old road, no new burthen is laid upon them; their labour is only transferred from one place to another. But if the new road lies in another parish, the person who sued out the writ, and his heirs, ought to keep it in repair, because the inhabitants of the other parish gaining a benefit from the old road being taken away, it would be imposing a new charge upon them, for which they enjoyed no compensation. 3, Adu. 772.

SECT 8. Secondly, A particular person may be bound to repair a highway in respect of a prescription; (a) and it is said,

That a corporation aggregate may be compelled to do it by force of a general prescription, That it ought and hath used to do it, without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration, because such a corporation in judgment of law never dies, and therefore, if it were ever bound to such a duty, it must needs continue to be always so, neither is it any plea, That such corporation have always done it out of charity; for what it hath always done, it shall be presumed to have been always bound to do, but it is said, That a person cannot be charged with such a duty by a general prescription from what his ancestors have done, because no one is bound to do what his ancestors have done, unless it be for some special reason, as the having land descended from such ancestors, which are holden by such like service, &c. yet it seems, That an indictment charging a tenant in fee simple with having used of right to repair such a way *in one tenura terra sua*, is certain enough, without adding, That his ancestors, or those whose estate he hath, have always so done, for that is implied in saying, That he has always used to do it *in one tenura sua*. Also an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous, &c. and the words *in one tenura*, &c. if added, are surplus.

SECT 9. However it seemeth certain, That whether a particular person be bound to repair a highway by inclosure, or prescription, &c. yet the parish cannot take advantage of it upon the plea of Not guilty to an indictment against them for not repairing it, but ought to set forth their discharge in a special plea. (5)

(5) The repair of highways lies, of common right, upon the whole parish. But if a parish lies in two distinct counties, an indictment may be brought against that part of the parish in which the ruinous road lies. 4 Burr. 2511. But it must appear upon the face of the indictment by what right the charge is laid upon the particular division of any parish which is in one county only. 5 Burr. 2702. As that they have repaired time out of mind. Andr. 276. B. R. H. 259.

(a) Where the
or 10 away
1 account for
the prescription
is destroyed
St an 100.
2 Stroud. 100.
27 Affix. 8
25 Ed 4. 38.
Fris k Presc ip-
tion 49. 49.
Far 54. 55.
2 Fd 4 31.
A person indicted
for not re-
pairing the
shall be off to
the great r.
1 Bla 6
5 v. e B. a. k.
K. v. Ch. unt
c n r.
Kelw 17 a.
Litt' 206
Salk 77 381.
6 M n 150.
100. 2 4
Salk. 257. 2.

1 M d 112.
3 K 112 3 r.
1 v. 112 256.
10 Mod. 150.
382.
12 M 1 m 15.
195. 4 49
La R. 112 5.
2. 1102.
St ange 179.

Sec. 10. AND now I am to consider in the second place, at whose charge, and by whom the highway ought to be repaired by force of THE STATUTE.

For the better understanding whereof, I shall examine: First, Who are by statute compellable to work in the repairs thereof in their own persons, or by others. Secondly, Who may be assessed to a rate made for the defraying of the extraordinary charges of such repairs. Thirdly, What other provisions have been made to this purpose. Fourthly, In what manner the profits of lands settled in trust for the repairs of the highways shall be employed.

Statute duty.

N. B. 13

Geo. 3. c. 34.

§ 60. the same powers are given to the surveyor of turnpike roads, with the consent of the trustees.

(6) The inhabitants of a parish into which a road is turned by turnpike trustees, are not bound to do statute work thereon. Black. 603.

(7) The appointment of the five days work must specify the particular days. 1d Raym. 358.

1. As to the first point, It is enacted by 13 Geo. 3. c. 78. par. 34. "That the surveyor to be appointed, as hereafter mentioned, together with the inhabitants (6) and occupiers of lands, tenements, woods, tithes, and hereditaments, within each parish, township, or place, shall at proper seasons in every year, use their endeavours for the repair of the highways, and shall be chargeable thereunto, as followeth: "Every person keeping a waggon, cart, wain, plough, or tumbrel, and three or more horses or beasts of draught used to draw the same, shall be deemed to keep a team, draught, or plough, and be liable to perform statute-duty with the same, in the parish, township, or place, where he resides, and shall, six days (7) in every year, (if so many days shall be found necessary) to be computed from Michaelmas to Michaelmas, send on every day, and at every place, to be appointed by the surveyor for the amending the highways in such parish, township, or place, one wain, cart, or carriage, furnished after the custom of the country, with oxen, horses, or other cattle, and all other necessities fit to carry things for that purpose, and also two able men with such wain, cart, or carriage; which duty so performed, shall excuse every such person from his duty in such parish, township, or place, in respect of all lands, tenements, woods, tithes, or hereditaments, not exceeding the annual value of fifty pounds, which he shall occupy therein. And every person keeping such team, draught, or plough, and occupying in the same parish, township, or place, lands, tenements, woods, tithes, or hereditaments, of the yearly value of fifty pounds, over and beyond the said yearly value of fifty pounds, in respect whereof such team-duty shall be performed; and every such person occupying to the yearly value of fifty pounds in any other parish, township, or place, besides that wherein he resides, and every other person not keeping a team, draught, or plough, but occupying to the yearly value of fifty pounds, in any parish, township, or place, shall, in like manner respectively, and for the same number of days, send on one wain, cart, or carriage, furnished with not less than three horses, or four oxen and one horse, or two oxen and two horses, and two able

able men to each wain, cart, or carriage; and in like manner for every fifty pounds *per annum* respectively, which every such person shall further occupy, in any such parish, township, or place respectively, such wains, carts, or carriages, to be employed by the surveyor in the repairing and amending the highways within the parish, township, or place, where such lands, tenements, woods, tithes or hereditaments, shall respectively lie; and every person who shall not keep a team, draught, or plough, but shall occupy under the yearly value of fifty pounds, in the parish, township, or place where he resides, or in any parish, township, or place; and every person keeping a team, draught, or plough, and occupying under the yearly value of fifty pounds, in any other parish, township, or place, than that wherein he resides, shall respectively contribute to the repair of the highways, and pay to the surveyor of such parish, township, or place respectively, in lieu of such duty, the sums following; *viz.* For every twenty shillings of the annual value of such lands, tenements, woods, tithes, or hereditaments respectively, the sum of one penny for every day's statute-duty which shall be required and called for by the surveyor of such parish, township, or place respectively, in every year not exceeding six days duty in the whole, as aforesaid; and every such person respectively shall, in like manner, pay the sum of one penny for every twenty shillings of the annual value which he shall occupy in any such parish, township, or place respectively, above the annual value of fifty pounds, and less than one hundred pounds, and so for every twenty shillings that each progressive and intermediate annual value of twenty shillings, which he shall so occupy, shall fall short of the further increase of fifty pounds, in every parish, township, or place, where such lands, tenements, woods, tithes, and hereditaments, shall respectively lie, for every day's statute-duty so to be required as aforesaid; which said several sums shall be considered as compositions, and shall be paid to the surveyor of the parish, township, or place, in which they are charged, for the use of the highways therein, at the time such compositions are to be paid under the authority of this act, or within ten days after; or in default of such payments, such money shall be levied by distress, and sale of the goods and chattels of the person or persons refusing to pay the same, in such manner as the forfeitures for the neglect in performing the statute-duty are hereby authorized to be levied and raised: Provided, that no person keeping such team, draught, or plough, and performing the duty with the same, as aforesaid, in the parish, township, or place, where he resides, and not occupying within the same, to the yearly value of thirty pounds, shall be obliged to lend more than one labourer, with such team, draught, or plough.

Composition
money.

How the contribu-
tions are to
be received.

The duty required from persons who do not keep a team, but keep one or two horses, or who draw, or who keep a cart, or post chaise, &c.

† *Sec. 11.* And it is further enacted by the said statute, par. 35. "That every person who shall not keep a team, draught or plough, but shall keep one or more cart, or carts, and, "one or two horses or beasts of draught only, used to draw in "each of such carts upon the highways, shall be obliged to "perform his statute-duty for the like number of days with "such cart or carts, and horse or horses, or beasts of draught, "and one labourer to attend each cart, or to pay for the lands, "tenements, woods, and hereditaments, which he shall occupy, according to the rate aforesaid, at the option of the "surveyor; and every person who shall keep a coach, post-chaise, chair, or other wheel-carriage, and not keep a team, draught, or plough, nor occupy lands, tenements, woods, tithes, or hereditaments, of the annual value of fifty pounds, in the parish, township, or place where he shall reside, shall "pay to the surveyor one shilling in respect of every such day's statute-duty, for every horse which he shall draw "in any such carriage, or shall pay according to the value "which he shall occupy, according to the rate aforesaid, at the option of the surveyor; and also every man inhabiting "in any parish, township, or place, and being of the age of eighteen, and under the age of sixty years, not chargeable "in any of the respects aforesaid for lands, tenements, woods, tithes, or hereditaments, of the yearly value of four pounds, or upwards, and not being *bona fide* an apprentice or menial servant, nor having performed the said duty, or paid the "composition for the same, in any other parish, township, or place, for that year, shall, by themselves, or one sufficient labourer for every of them, upon every of the said days on "which they shall be called forth by the said surveyor, together with the said other labourer, work and labour in "the amendment of the said highways, as they shall be directed by such surveyor; and if the said teams, draughts, or ploughs, or any of them, shall not be thought needful "by the surveyor on any of the said days, then every such person who should have sent any such team, draught, or plough, according to the directions aforesaid, shall, according to the notice to be given, as herein after directed, send "unto the said work, for every one so hired, three able men, there to labour as aforesaid, or to pay to the said surveyor four shillings and sixpence in lieu thereof; and all such persons as aforesaid shall respectively have and bring with them "such shovels, spades, picks, mattocks, and other tools and instruments as are useful and proper for the purposes aforesaid; and all the said persons and carriages shall diligently "perform the work and labour to which they shall be appointed by such surveyor for eight hours in every of the said days, within such parish, township, or place, or in getting "and carrying materials in and from any other parish, township, or place, to be employed in the repair of the highways "in the parish, township, or place, for which they shall be "required

Three men to be sent, or 4s. 6d. to be paid.

Three men to be sent, or 4s. 6d. to be paid.

“ required to perform such duty and labour as aforesaid: And The hours of
 “ if any person sending a team, as aforesaid, shall not find a working, &c.
 “ sufficient labourer besides the driver, (except as herein-before
 “ mentioned); or if any such labourer, or driver, or any other
 “ labourer, or the driver of any cart, required by this act to
 “ perform statute-duty as aforesaid, shall refuse to work and
 “ labour, during the time above-mentioned, according to the
 “ direction of the surveyor; or if any driver shall refuse to
 “ carry proper and sufficient loads; it shall and may be law-
 “ ful for such surveyor to discharge every such team, cart, or
 “ labourer, and to recover from the owner of every such
 “ team or cart the forfeiture which every such person or per-
 “ sons would have incurred by virtue of this act, in case no
 “ such team, cart, or labourer respectively, had been sent.”

† *Sec. 12.* It is also further enacted by the above-mentioned Part of a team
 statute, par. 36 “ That the surveyor, where the employment may be called
 “ for teams is of such sort that two horses will be sufficient for.
 “ for one cart, or where a stand cart with one horse shall be
 “ necessary, shall call upon any person liable to send a team,
 “ draught, or plough, by virtue of this act, who keeps one
 “ or more cart or carts, and three or more horses, to send
 “ such cart or carts, horse or horses, to perform his statute-
 “ duty, as the surveyor shall find most convenient, and shall
 “ direct; and the surveyor shall allow every such stand cart
 “ and one horse as half a team, and every cart and two hor-
 “ ses as two-thirds of a team; and if a waggon shall be found
 “ necessary for any particular business, the surveyor may re-
 “ quire the duty, or any part thereof, to be performed with
 “ such waggon, by any person who keeps one; which direc-
 “ tions of the surveyor shall be observed, or the person liable
 “ to perform such duty shall forfeit such sum as the duty so
 “ required of him shall bear, in proportion to the forfeiture
 “ hereby inflicted for every neglect in performing duty with
 “ a team, draught, or plough.”

† And further by par. 37. “ Every such surveyor shall, Notice and
 “ from time to time, give to, or cause to be left at the forfeiture.
 “ house or usual place of abode of every person or persons
 “ so liable to perform such duty or labour, as in this act di-
 “ rected, four days notice at the least of the day, hour, and
 “ place, upon which each of the said day's duty shall be
 “ required to be performed; and every person or persons
 “ making default in sending and sending each wain, cart, or
 “ carriage, furnished as aforesaid, and such able men with
 “ the same, as herein required, or in performing the said duty
 “ at the time and place, and in the manner, by this act di-
 “ rected, shall, for every such default or neglect in sending
 “ such wain, cart, or carriage, with such men as aforesaid,
 “ forfeit the sum of ten shillings; and for every default in
 “ sending every cart with one horse and one man, three
 “ shillings;

“The surveyor to
be appointed.”

“ shillings; and for not sending every cart with two horses
“ and one man, five shillings: and every person or persons
“ making default in sending any such labourer, and every per-
“ son making default in performing such labour, at the time and
“ place, and in the manner directed by this act, or in paying
“ such composition-money for the same, as herein mentioned,
“ shall, for every such neglect, forfeit the sum of one shilling
“ and sixpence; all which forfeitures shall be applied for the
“ use of the highways within the parish, township, or place,
“ where the same shall arise; and the said surveyor shall fairly
“ and equally demand and require such duty and labour from
“ every person or persons liable to perform the same, according
“ to the directions of this act, without favour or partiality to
“ any person or persons whomsoever: and if in any parish,
“ township, or place, it shall not be necessary to call forth the
“ whole duty in any year, it shall be abated in a just and
“ equal proportion amongst all persons liable to the same;
“ and the said surveyor may and shall, and he is hereby re-
“ quired, with all convenient speed, after default made in per-
“ formance of such duty or labour as aforesaid, to proceed for
“ the recovery of the penalties or forfeitures hereby inflicted
“ for the same respectively, in manner herein-after directed,
“ so that the same may be recovered before he makes up his
“ accounts in the manner directed by this act.”

Application of
the forfeitures.

Compounding.

+ Sect. 13. But it is also further enacted by par. 38. “ That
“ any person or persons liable to perform the said duty, by
“ sending one or more team or teams, draught or draughts,
“ plough or ploughs, with men, horses, or oxen, in manner
“ aforesaid, shall and may compound for the same, if he, she, or
“ they, shall think fit, by paying to the said surveyor, at the
“ time, and in the manner, herein after mentioned, such sum
“ or sums of money as the justices of the peace for the limit
“ wherein such parish, township, or place, shall be, or the
“ major part of them, at their said special sessions, to be held
“ in the first week after Michaelmas quarter sessions in every
“ year, shall adjudge and declare to be reasonable, not ex-
“ ceeding six shillings, nor less than three shillings, for each
“ team, draught, or plough, for each day; and in default of
“ their adjudging and declaring the same, the sum of four
“ shillings and six pence for and in lieu of ever such day’s
“ duty for each team, draught, or plough; and for every cart
“ and one horse or beast of draught, two shillings; and for
“ every cart with two horses or beasts of draught, three shil-
“ ling, for and in lieu of every day’s duty; and every inhabi-
“ tant liable to perform such duty or labour, as aforesaid, and
“ not chargeable in any other respect, as aforesaid, shall and may
“ compound for the same, if he, she, or they, shall think fit,
“ by paying to the surveyor the sum of four-pence for and in
“ lieu of every such day’s duty or labour respectively, at the
“ time,

“ time, and in the manner, herein-after directed for the payment of composition-money.

† Provided by par. 39. “ That if it shall appear to the justices, at their special sessions, to be held in the week next after *Michaelmas* quarter sessions, that, from the directions herein before given for the performing and compounding the statute-duty, there will be difficulty in procuring the necessary carriages, or a sufficient number of labourers, for the repair of the highways, in any particular parish, township, or place, within their respective limits, without paying high and extravagant prices for the same, it shall and may be lawful for such justices to order and direct the team-duty hereby required, or so much thereof as they shall think fit, to be performed in kind, within every such parish, township, or place, except in respect of such teams as belong to persons who do not occupy lands, tenements, woods, tithes, or hereditaments, of the annual value of thirty pounds within the same; and also to order the labourers, liable by this act to perform or compound for statute-duty, or such part of them as they shall think fit, to perform six days labour upon such highways in kind, in case so many days duty shall be required, upon being paid for such labour the usual and customary wages given to labourers in such parish, township, or place, deducting thereout the sum of four-pence for each day's duty to performed, being the composition hereby allowed for labourers: provided, that if part of such teams or labourers only are required, it shall be directed by the said order of the justices in some given proportion, as one half, third, or fourth part thereof; and the surveyor shall, in that case, at a public vestry for such parish, township, or place, put the names of all the persons liable by this act to send such teams into one hat or box, and the names of all the persons liable to perform such labour, into another hat or box, and some inhabitant then present shall draw out such number from each as shall be equal to the proportion so ordered by the said justices, and the persons so drawn shall perform such duty in kind for that year; and that if any such order shall be made or continued in the subsequent year, the same method shall be observed, but the names drawn in the preceding year shall not be put into such hat or box; and in every succeeding year such method and regulation shall be observed by such surveyor, as to render the duty so required to be performed in kind as equal amongst the several persons liable thereto as may be: which order of the said justices, so far as the same shall be extended, shall supersede the said power of liberty of compounding, and shall be binding and effectual to all intents and purposes whatsoever, and shall continue in force until it shall be discharged or varied by the

Power of justices to direct duty in any part of a parish, &c.

“ justices at some subsequent special sessions for the highways
 “ within such limit, to be held in the week next after *Mi-*
 “ *chaelmas* quarter sessions.

Power of
 Enclosures.

† It is also further enacted by par. 40. “ That where any
 “ person shall keep a team, draught, or plough, and shall
 “ not occupy lands, tenements, woods, tithes, or heredita-
 “ ments, to the value of thirty pounds *per annum*, in the pa-
 “ rish, township, or place, where he shall reside, but shall in
 “ part maintain his horses and beasts of draught used in such
 “ team upon or from lands which he shall occupy in one or
 “ more adjacent parish or parishes, it shall and may be law-
 “ ful for the said justices, at some special sessions, to mitigate
 “ and reduce the duty or composition so required to be per-
 “ formed or paid by such person or persons, in such manner,
 “ and to such sum, as they shall think just and reasonable.

Surveyors to
 give notice of
 the time and
 place of com-
 pounding.

‡ Provided, par. 41. “ That the said surveyor of every parish
 “ township, or place, shall, on some *Sunday* in *November* in every
 “ year, cause ten days notice at the least to be given in the
 “ church or chapel of such parish, township, or place, and if
 “ there be no church or chapel, or no service performed
 “ therein, then at the most publick place there, and repeat
 “ the like notice in such church, chapel, or place, on the
 “ next succeeding *Sunday*, or the time and place when and
 “ where the persons permitted under the authority of this act,
 “ and licensed to compound for the said duty, in manner
 “ aforesaid, may signify to such surveyor their intention to
 “ compound; and all persons signifying the same, who shall
 “ then, or within the space of one calendar month after-
 “ wards, pay to such surveyor the composition authorized and
 “ allowed by this act, shall be discharged from the perform-
 “ ance of such duty, which composition-money shall be em-
 “ ployed by the surveyor for the use of the highways; and
 “ that no composition shall be permitted, unless the same shall
 “ be paid at the day, or within the time aforesaid; but in
 “ cases where the occupation of any lands, tenements,
 “ woods, tithes, or hereditaments, shall be changed, or any
 “ new occupant or inhabitant shall come to reside in such
 “ parish, township, or place, after the time appointed for
 “ such composition, then the person or persons occupying such
 “ lands, tenements, woods, tithes, or hereditaments, or so
 “ residing in such parish, township, or place, shall be allowed
 “ to compound in manner aforesaid: provided, he, she or they,
 “ shall pay the said composition-money to the said surveyor
 “ within fourteen days after he, she, or they, shall enter upon
 “ such lands, tenements, or hereditaments, or shall come to
 “ reside in such parish, township, or place; and every tenant
 “ or occupier of any lands, tenements, woods, tithes, or he-
 “ reditaments, who intends to quit the possession thereof,
 “ within

" within six calendar months from the time fixed for making such composition, shall and may compound, for half the duty hereby required, and the succeeding tenant or occupier shall and may, in that case, compound or perform the duty in kind for the other half thereof; and if the surveyor shall receive from any person or persons a composition for more duty than shall be required from the other inhabitants and occupiers within the same parish, township, or place, for the same year, he shall repay such extraordinary composition-money to such person or persons, so as to bring the duty to an equality amongst all such inhabitants and occupiers.

How the compositions shall be paid, &c.

" § 14. And it is further enacted by par. 42. where any person shall keep a draught or plough, and no carriage, he shall pay to the surveyor the sum of one shilling for every horse or pair of oxen or neat cattle, used in such draught or plough, for every day's statute-duty on the day such duty is required to be performed, or pay according to the rate aforesaid for the lands, tenements, woods, tithes, and hereditaments, which he shall occupy in such parish, township, or place, at the option of the surveyor. And by par. 43. the inhabitants of every parish, township, or place, at some vestry, or other publick meeting, held pursuant to this act, may appoint three months in every year, within which no statute-duty shall be performed. One month in the spring, to be called the *seed month*; one month in the summer, for the hay harvest; and one other month in the summer, for the corn harvest: provided, that notice in writing, be given of the times so appointed to the surveyor of such parish, township, or place respectively, and also to the surveyor of every turnpike road lying within the same, within three days after every such meeting and fourteen days at least before the beginning of each of such months.

Duty where no carriage is kept.

Of the seed month.

† N. B. In the exposition of the former statutes upon this subject, *viz.* The 2 and 3 Philip and Mary, c. 8. f. 2. The 22 Car. 2. c. 12. f. 8. and 9. The 18 Eliz. c. 10. sect. 2. and 3. and The 7 and 8 Will. 3. c. 29. the language of which is, with little variation, pursued by the above statute, 13 Geo. 3. c. 78. the following opinions have been holden.

Enumeration of the statutes upon this subject recited in the former edition.

Sec. 15. First, That (a) persons in holy orders are within the purview of them, in respect of their spiritual professions, as much as any other persons whatsoever, in respect of any other possessions, for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others. (S)

(a) 3 Keb. 255, 476.
1 Venn's 2-3.
Watson 40.
2 Inst. 704.
(S) But by 30 Geo. 2. c. 25. f. 23. persons bringing forth them-

selves as privates in the militia are exempted from statute work during the time of such service.

(a) Rym. 156.
 3 Kebble 507.
 4 S. 308.
 Vide Dist. c. 26.
 2 Kebble 617.

Sett. 16. Secondly, (a) That he who keeps several draughts in a parish is bound to lend a team for each draught, whether he occupy any land in the parish or not; and in like manner, That he who occupies several plough-lands, ought to send a team for each plough-land, whether he keeps any draught, or not.

(b) Palm. 389.
 2 Roll 412.

Sett. 17. Thirdly, That (b) notwithstanding the words of the statute extend only to the occupiers of lands, yet if the owner neither occupy them, nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them, for there is no reason that the publick shall suffer for his negligence.

Dalb. c. 25.

Sett. 18. Fourthly, That it is no excuse for the inhabitants of a parish, being indicted at common law for not repairing the highways, That they have done the full work required of them by statute; for since these statutes are wholly in the affirmative, and made in aid of the common law, and to supply the defects thereof, they shall not be construed to abrogate any provision thereby made for these purposes.

Chapter 26.

N. B. DALTON is of opinion, that he who keeps a draught and but two horses, ought to attend therewith at the times appointed, and that if he carry with them such loads as they are able to draw, he shall be excused.

Here the funds
 of turnpike
 roads may be
 applied to the
 repairs of
 the highways.

† *Sett.* 19. And whereas there may be *turnpike roads* in such a state and condition of repair, that the statute duty required to be performed upon them may be dispensed with, &c. &c. It is therefore enacted by 13 Geo. 3. c. 84. sect. 58. "That the justices at any special sessions, upon application to them made by the surveyor of any place, in which such turnpike road lies, may summon the clerk and surveyor of such turnpike road to appear before them, at some other special sessions, and then and there to produce before them a state of the revenues and debts belonging to such turnpike road, and such justices may then and there enquire into the state and condition of the repairs thereof, and also of such other highways, and if it shall appear to them, upon full and clear evidence, that the whole or any part of such statute duty may be conveniently dispensed with from such turnpike roads, without endangering the securities for the money advanced upon the credit of the tolls thereof, and that such statute duty is wanted for the repairs of the other highways within such parish, township, or place, the said justices may order the whole or part of such statute duty to be performed upon the highways, not being turnpike, within such parish, township, or place, under the direction of the surveyor thereof, during such time as to them shall seem just and reasonable."

Sett.

† *Sec. 20.* As to the second point, *viz.* Who may be assessed to a rate made for the defraying of the extraordinary charges of such repairs, it is recited by the above mentioned statute of 13 Geo. 3. c. 78. par. 30. "That in some parishes, townships, or places, there may not be sufficient materials for the repair of the highways within the same, nor within the waste lands, common grounds, rivers or brooks, of any other parish, township, or place, lying within a convenient distance from such highway, by reason whereof the surveyor of such highway may be forced to buy such materials, and to make recompence and satisfaction to the owner or occupier of inclosed lands, for damage which may be done by getting and carrying thereof: and whereas no provision is made for raising a fund to reimburse the expences thereof, and also such expences as the said surveyors may incur, by erecting guide-posts, or other posts or stones, and by making or repairing such trunks, tunnels, plates, bridges, or arches, as aforesaid, and by rendering satisfaction for damages done to lands by the making of new ditches or drains, nor for the salary to be paid by such parish, township, or place, to such surveyor, as aforesaid;" it is therefore enacted, "That upon application by such surveyor to the justices of the peace, at their special sessions, and oath made of the sum or sums of money which he hath *bona fide* laid out and expended, or which will be required for the purposes aforesaid, the said justices, or any two or more of them, shall, and they are hereby empowered, by warrant under their hands and seals, to cause an equal assessment to be made, for the purposes aforesaid, upon all occupiers of lands, tenements, woods, tithes, and hereditaments, within such parish, township, or place, where such money shall be so expended or laid out; and the same shall be made and collected by such person or persons, and allowed in such manner, as the said justices, by their order at such sessions, shall direct and appoint in that behalf; and the money thereby raised shall be employed and accounted for according to the direction of the said justices, for the purposes aforesaid; and the said assessment shall be levied in such manner as herein-after mentioned: provided nevertheless, That no such assessment to be made for those or any of those purposes, in any one year, shall exceed the rate of sixpence in the pound, of the yearly value of the lands, tenements, woods, tithes, and hereditaments, so to be assessed."

The 22 Car. 2.
l. 10, 11.
The 3 and 4
Will. and Mar.
c. 12.
The 7 and 8
Will. 3. c. 29,
l. 4. which were
here recited in
the former edition
of this work
are repealed by
7 Geo. 3. c. 42.

(9) An order for
imposing a rate
was quashed,
because it did
not appear but
that the statute
duty was
sufficient, and
became only the
occupiers of
land were
charged, where-
as others are
equally liable.
Str. 315. Sed
Vid. Fent. 327.

† *Sec. 21.* And it is further enacted by the above mentioned statute of 13 Geo. 3. c. 78. par. 45. "That if upon application of the surveyor of the highways for any parish, township, or place, to the justices of the peace for the limit wherein such parish, township, or place, lieth, at their
" general

Vide the case of
the King v.
Inh. of Newton
in Cheshir

In what manner
an assessment
may be made.

“ general or quarter sessions of the peace, or at some special
“ sessions for the highways, the said justices shall be fully sat-
“ isfied, by proof upon oath, that the duty directed to be
“ performed, and the money authorised to be collected and
“ received, has been performed, applied, and expended, ac-
“ cording to the directions of the act, or shall be fully satis-
“ fied that the common highways, bridges, lanesways,
“ streets, or pavements, belonging to such parish, town-
“ ship, or place, are so far out of order that they cannot be
“ sufficiently amended and repaired, paved, cleaned, and
“ supported, by the means herein-before prescribed, (notice
“ being first given of such intended application at the church
“ or chapel of such parish, township, or place, on some day
“ day preceding such quarter or special sessions; or if the
“ place be extraparaohial, notice in writing being first given
“ of such intended application to the principal inha-
“ bitants residing in such extraparaohial place, a week at least
“ before such general or special sessions; and then, and in
“ any of the said cases, an equal assessment upon all and
“ every the occupier of lands, tenements, woods, tithes, and
“ hereditaments, within any such parish, township, or place,
“ shall or may be made and collected by such person and per-
“ sons, and allowed in such manner, as the said justices, by
“ their order, at such general or special sessions, shall direct
“ and appoint in that behalf; and the money thereby raised
“ shall be employed and accounted for, according to the or-
“ ders and directions of the said justices, for amending, re-
“ pairing, paving, cleaning, and supporting
“ such highways, causeways, streets, pavements, and bridges,
“ from time to time, as need shall require.

No assessor
shall be ap-
pointed.

§ Stat. 22. And it is further enacted by the same statute, par.
26. “ That the assessment herein-before authorised, and
“ the assessment herein-before authorised, for buying mate-
“ rials, making, setting, or repairing, erecting guide-posts,
“ and paying the surveyor’s salary, (vide post.) shall not to-
“ gether in any one year exceed the rate of nine-pence in the
“ pound of the yearly value of the lands, tenements, woods,
“ tithes, and hereditaments, so to be assessed.

Note. The pro-
visions of 3 Geo. 4
W. 2. M. upon
the subject were
inserted in the
statute, but that statute
is now fully
repealed.

§ Stat. 23. As to the third point, viz. What other provisions
have been made to this purpose, it is enacted by the said sta-
tute of 13 Geo. 3. c. 78. par. 47. “ That no fine, issue,
“ penalty, or forfeiture, for not repairing the highways, or
“ not appearing to any indictment or presentment for not re-
“ pairing the same, shall hereafter be returned into the Court
“ of Exchequer, or other court, but shall be levied by and
“ paid into the hands of such person or persons residing in or
“ near the parish, township, or place, where the road shall
“ lie, as the court imposing such fines, issues, penalties, or
“ forfeitures, shall order and direct, to be applied towards the
“ repair

“ repair and amendment of such highways; and the person
 “ or persons so ordered to receive such fine shall, and is here-
 “ by required to receive, apply, and account for the same,
 “ according to the direction of such court, or, in default
 “ thereof, shall forfeit double the sum received; and if any
 “ fine, issue, penalty, or forfeiture, to be imposed on any
 “ such parish, township, or place, for not repairing the high-
 “ ways, or not appearing as aforesaid, shall hereafter be levied
 “ on any one or more of the inhabitants of such parish, town-
 “ ship, or place, that then such inhabitant or inhabitants
 “ shall and may make his or their complaint to the justices of
 “ the peace, at their special sessions; and the said justices are
 “ hereby empowered and authorised, by warrant under their
 “ hands and seals, to cause a rate to be made, according to
 “ the form and manner herein last before prescribed, for the
 “ reimbursing such inhabitant or inhabitants the monies so le-
 “ vied on him or them as aforesaid; which rate so made,
 “ and confirmed by any two justices, shall be collected and
 “ levied by the surveyor of the highways of such parish, town-
 “ ship, or place, so presented or indicted, as aforesaid; and
 “ the said surveyor shall, within one month next after the
 “ making and confirming the rate aforesaid, collect, levy,
 “ and pay unto such inhabitant or inhabitants the money so
 “ levied on him or them as aforesaid.” (10)

Fines, &c. how
levied and
applied.

(NOTE.) A parish consisting of two districts, which are bound to repair separately, be considered for the purpose of the repair of the highways, the said court having no notice of the indictment, and will not be bound to send any of the jury to either of the districts, and if the indictment is an indictment on the whole, will grant a writ of habeas corpus for a rate to be levied on the whole parish, or on the part of the parish, as the court shall think fit. But the mandamus must be specific, to require the surveyor of the highways, who has the subject of the indictment, lay wholly in the township, and that the justices, who are bound to send a jury to each of the respective parts of the highway, in order to advise the indicted township an opportunity of examining the facts. Doe v. 122. Strong 711.

§ 24. Also the later statutes (a) which have imposed any penalties on surveyors of the highways, or others, for any offences relating to the highways, have generally ordained that the whole, or part thereof, shall be applied to the repairs of the highways of the places wherein the offence shall be committed, as will more fully appear in the subsequent part of this chapter.

(a) This re-
lates to the sta-
tutes now re-
pealed.

§ 25. As to the fourth point, viz. In what manner the profits of lands settled in trust for the repairs of the highways shall be employed, it is enacted by the above mentioned statute of 13 Geo. 3. c. 78. par. 52. “ That where any lands
 “ have been, or shall be given, for the maintenance or cause-
 “ ways, pavements, highways, and bridges, all such persons
 “ who are, or shall be seised or trusted with any such
 “ lands, shall let them to farm at the most improved yearly
 “ value, without fine; and that the justices of the peace, in
 “ their

The 22 Geo. 2.
c. 12. s. 2. 1727.
c. 78. in the 13th
year of the king
now repealed by
7 Geo. 3. c. 42.

Persons un-
fitted with lands.

“ their open feffions, shall and may inquire, by such ways and means as they shall think fitting, into the value of all such lands so given, or to be given, and order the improvement and employment of the rents and profits thereof according to the will and direction of the donor of such lands, if they find that the persons so intrusted have been negligent or faulty in the performance of their trust, except such lands have been given for the uses aforesaid to any college or hall in either of the universities of this kingdom, which have visitors of their own.”

This Statute
repealed by
Geo. 3. c. 4.
but it is re-
vived by 3 Geo. 3.
c. 1. s. 11. &c.

§ 26. As to the third general head of this chapter, viz. In what manner the highway is to be enlarged, it is enacted by 13 Ed. 1. Stat. 2. commonly called the statute of *Winchester*, chap. 5. “ That highways leading from one market-town to another shall be enlarged, so that there be neither dyke, tree, nor bush, whereby a man may lurk to do hurt, within two hundred foot of the one side, and two hundred foot of the other side of the way: so that the statute shall not extend to alders, nor unto great trees, &c. and if by default of the lord that will not avoid the dyke, underwood, or bushes, in the manner aforesaid, any robberies be done therein, the lord shall be answerable for the felony, and if murder be done, the lord shall make a fine at the king's pleasure: and if the lord be not able to fell the underwood, the country shall aid him therein. And the king willeth, that in his demean lands and woods within his forest, and without, the ways shall be enlarged, as before is said. And if per-acre a park be taken from the highway, it is requisite that the lord shall set his park the space of two hundred foot from the highways, as before is said, or that he make such a wall, dyke, or hedge, that offenders may not pass nor return to do evil.”

(11) It is a high-
way be not much
wanted for the
use of the pub-
lic, so indiffer-
ent will not be
for suffering it
to be out of re-
pair. § 27. c. 4.

† § 27. It is also enacted by the 13 Geo. 3. c. 78. par. 15. “ That the said surveyors of the highways shall make, support, and maintain, or cause to be made, supported, and maintained, every publick (11) cartway leading to any market town, twenty feet wide at the least; and every publick horseway or driftway, eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof.”

Widening roads.

† § 28. But by par. 16. “ Where it shall appear, upon the view of any two justices, that the ground or soil of any highway between the fences thereof is not of sufficient breadth, and may be conveniently widened and enlarged, or that the same cannot be conveniently enlarged, and made commodious for travellers, without diverting and turning the same; such justices

" justices shall, and they are hereby impowered, within their
 " respective jurisdictions, to order (12) such highways respec-
 " tively to be widened and enlarged, or diverted and turned, in
 " such manner as they shall think fit, so that the said high-
 " ways, when enlarged and diverted, shall not exceed thirty
 " feet in breadth; and that neither of the said powers do
 " extend to pull down any house or building, or to take
 " away the ground of any garden, park, paddock, court, or
 " yard; and, for the satisfaction of the person or persons,
 " bodies politick or corporate, who are seized or possessed of,
 " or interested in their own right, or in trust for any other
 " person or persons, in the said ground that shall be laid into
 " the said highways respectively, so to be enlarged, or through
 " which such highway so to be diverted and turned, shall go,
 " the said surveyor, under the direction, and with the appro-
 " bation of the said justices, shall, and is hereby impowered
 " to make an agreement with him, her, or them, for the
 " recompence to be made for such ground, and for the mak-
 " ing such new ditches and fences as shall be necessary, ac-
 " cording and in proportion to their several and respective
 " interests therein, and also with any other person or persons,
 " bodies politick or corporate, that may be injured by the
 " enlarging, altering, or diverting such highways respectively,
 " for the satisfaction to be made to him, her, or them respec-
 " tively, as aforesaid: and if the said surveyor, under the di-
 " rection, and with the approbation of the said justices, can-
 " not agree with the said person or persons, bodies politick
 " or corporate, or if he, she, or they, cannot be found, or
 " shall refuse to treat, or take such recompence or satisfaction
 " as shall be offered to them respectively, such surveyor;
 " then the justices of the peace, at any general quarter ses-
 " sions to be holden for the limit wherein such ground shall
 " lie, upon certificate in writing, signed by the justices
 " making such view as aforesaid, of their proceedings in the
 " premises, and upon proof of fourteen days notice in writ-
 " ting having been given by the surveyor of such parish,
 " township, or place, to the owner, occupier or other per-
 " son or persons, bodies politick or corporate, interested in
 " such ground, or to his, her, or their guardian, trustee,
 " clerk, or agent, signifying an intention to apply to such
 " quarter sessions for the purpose of taking such ground, shall
 " impanel a jury of twelve disinterested men out of the per-
 " sons returned to serve as jurymen at such quarter sessions;
 " and the said jury shall, upon their oaths, to the best of their
 " judgment, assess the damages to be given, and recompence
 " to be made, to the owners and others interested as aforesaid
 " in the said ground, for their respective interests, as
 " they shall think reasonable, not exceeding forty years pur-
 " chase for the clear yearly value of the ground to laid out,
 " and

(12) This power given to two justices to order any highway to be widened, extended to roads, repaired, &c. extends to roads repaired, &c. and upon disobedience to such order, the party may be prosecuted against him under the Statute, or by indictment as an offence against the common law. See also 2 Burr. 799.

Surveyors to be appointed by the justices of the peace.

Which may be enforced by a jury, &c.

On payment of money assessed the land to be a public highway.

“ and likewise such recompence as they shall think reasonable;
 “ for the making of new ditches and fences on the side or
 “ sides of the said highways that shall be so enlarged or diver-
 “ ted, and also satisfaction to any person or persons, bodies
 “ politick or corporate, that may be otherwise injured by the
 “ enlarging or diverting the said highways respectively; and
 “ upon payment or tender of the money so to be awarded and
 “ assessed to the person or persons, bodies politick or corpo-
 “ rate, intitled to receive the same, or leaving it in the hands
 “ of the clerk of the peace of such limit, in case such person
 “ or persons, bodies politick or corporate, cannot be found,
 “ or shall refuse to accept the same, for the use of the owner
 “ of, or others interested in, the said ground, the interest of
 “ the said person or persons, bodies politick or corporate,
 “ in the said ground, shall be for ever divested out of them,
 “ and the said ground, after such agreement or verdict as
 “ aforesaid, shall be esteemed and taken to be a publick high-
 “ way, to all intents and purposes whatsoever; saving never-
 “ theless to the owner or owners of such ground all mines,
 “ minerals, and fossils, lying under the same, which can or
 “ may be got without breaking the surface of the said high-
 “ way; and also all timber and wood growing upon such
 “ ground, to be fallen and taken by such owner or owners
 “ within one month after such order shall have been made,” or
 “ in default thereof, to be fallen by the said surveyor or sur-
 “ veyors, within the respective months aforesaid, and land
 “ upon the land adjoining, for the benefit of the said owner
 “ or owners: and where there shall not appear sufficient
 “ money in the hands of the surveyor or surveyors, for the
 “ purposes aforesaid, then the said two justices, in case of
 “ agreement, or the said court of quarter sessions, after such
 “ verdict as aforesaid, shall order an equal assessment to be
 “ made, levied, and collected, upon all and every the occu-
 “ piers of lands, tenements, woods, tithes, and hereditaments,
 “ in the respective parishes, townships, or places, where such
 “ highways shall lie, and direct the money to be paid to the
 “ person or persons, bodies politick or corporate, so interested,
 “ in such manner as the said justices, or court of quarter ses-
 “ sions respectively, shall direct and appoint: and the money
 “ thereby raised shall be employed and accounted for, accord-
 “ ing to the order and direction of the said justices, or court
 “ of quarter sessions respectively, for and towards the purcha-
 “ sing the land to enlarge or divert the said highways, and for
 “ the making the said ditches and fences, and also satisfaction
 “ for the damages sustained thereby; and the said assessment,
 “ if not paid within ten days after demand, shall, by order of
 “ the said justices, or court of quarter sessions respectively,
 “ be levied by the said surveyor, in the manner herein-after
 “ mentioned: provided that no such assessment to be made

Where there is not money sufficient assessments may be obtained by order of the justices of the quarter sessions.

"in any one year shall exceed the rate of expence in the pound of the yearly value of the land, tithes, woods, tithes, and hereditaments, so assessed." Not exceeding
6d. in the
pound.

† *Stat. 29.* And it is further enacted by the said Act, par. 17. "That when any such new highways shall be made, as aforesaid, the old highway shall be stopped up, and the land and soil thereof shall be sold by the said surveyor, with the approbation of the said justices, to some person or persons whose lands adjoin thereto, if he, she, or they, shall be willing to purchase the same; if not to some other person or persons, for the full value thereof: but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of such justices respectively, be accommodated with a convenient way and passage from such new highway, which they are hereby authorised to order and lay out, if they find it necessary; then, and in such case, the said old highway shall only be sold subject to the right of way and passage to such lands, house, or place respectively, according to the ancient usage in that respect; and the money arising from such sale, in either of the said cases, shall be applied towards the purchase of the land where such new highway shall be made: and, upon payment or tender of the money so to be agreed for as aforesaid, and upon a certificate being signed by the said two justices, or by the chairman of the said court of quarter sessions, in case the same shall be determined there, describing the lands to be sold, and expressing the sum so agreed for, and directing to whom the same shall be paid, and upon the purchaser's taking a receipt for such purchase-money from the person intitled to receive the same, by an indorsement on the back of such certificate, the soil of such old highway shall become vested in such purchaser and his heirs; but all mines, minerals, and fossils, lying under the same, shall continue to be the property of the person or persons who would, from time to time, have been intitled to the same, if such old highway had continued there." Highway
shall be
stopped up
and the land
thereof shall
be sold
subject to the
right of way and
passage.

Mines and mi-
nerals reserved
to the owners.

† *Stat. 30.* And it is also enacted, par. 18. "That in case such jury shall give in and deliver a verdict for more monies, as a recompence for the right, interest, or property, of any person or persons, bodies politick or corporate, in such lands or grounds, or for the making such fence, or for such damage or injury to be sustained by him, her, or them respectively, as aforesaid, than what shall have been proposed and offered by the said surveyor, before such application to the said court of quarter sessions as aforesaid; that then, and in such case, the costs and expences attending the said several proceedings shall be borne and paid by the surveyor." Costs of pro-
ceedings by
 whom payable.

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“ veyor of the said highway, out of the monies in his or their
 “ hands, or to be assessed and levied by virtue and under the
 “ powers of this act; but if such jury shall give and deliver
 “ a verdict for no more, or for less monies than shall have
 “ been so offered and proposed by the said surveyor before
 “ such application to the said court of quarter sessions; that
 “ then the said costs and expences shall be borne and paid by
 “ the person or persons, bodies politick or corporate, who
 “ shall have refused to accept the recompence and satisfac-
 “ tion so offered to him, her, or them, as aforesaid.”

(13) The fact of
 a highway being
 diverted by
 order of the
 justices of the
 peace, on a view
 taken by them,
 is a bar to a
 writ of *ad quod
 damnum*.

† *Sec. 31.* And it is also further enacted by the said statute,
 par. 19. “ That when it shall appear, upon the view (13) of
 “ any two or more of the said justices of the peace, that any
 “ publick highway, not in the situation herein-before describ-
 “ ed, or publick bridleway or footway, may be diverted,
 “ so as to make the same nearer or more commodious to the
 “ publick, and the owner or owners of the lands and grounds
 “ through which such new highway, bridleway, or footway,
 “ is proposed to be made, shall consent thereto, by writing
 “ under his or their hand and seal, or hands and seals, it shall
 “ and may be lawful, by order of such justices, at some spe-
 “ cial sessions, to divert and turn, and to stop up such foot-
 “ way, and to divert, turn, and stop up, and inclose, fill, and
 “ dispose of such old highway or bridleway, and to purchase
 “ the ground and soil for such new highway, bridleway, or
 “ footway, by such ways and means, and subject to such ex-
 “ ceptions and conditions, in all respects, as herein-before
 “ mentioned with regard to highways to be widened or di-
 “ verted; and where any such highway, bridleway, or foot-
 “ way, herein last before described, shall be so ordered to be
 “ stopped up or inclosed, and such new highway, bridleway,
 “ or footway, set out and appropriated in lieu thereof, as
 “ aforesaid, shall and may be lawful for any person or persons
 “ injured or aggrieved by any such order or proceedings, or
 “ by the inclosure of any road or highway, by virtue of any
 “ inquisition taken upon any writ of *ad quod damnum* to make
 “ his or their complaint thereof, by appeal (14) to the jus-

(14) Though the appeal is directed to the next quarter sessions, yet the justices may adjourn the
 quarter session itself to another day, or they may adjourn the particular matter to a subsequent
 session. And this appeal was thought by Lord Hardwicke to be a waiver to any objection of sur-
 prise, with respect to the male execution of the writ of *ad quod damnum*; for the statute has put
 the justices in the room of the traverse, and if the party in case of appealing had traversed the in-
 quiry, and time had been taken on it and a verdict found, he could not have applied to the court
 by writ upon a suggestion of surprise, and a fraudulent and clandestine execution of the writ.
 And upon such an enquiry, the court will not regard any complaint upon the ground of public
 inconvenience, for that would be setting up a jurisdiction in opposition to a jurisdiction appropriated
 by act of parliament to the quarter sessions only; but if a jury have manifestly done contrary to
 the general good of the country, it may afford a strong corroborating evidence of surprise. 3 Atk.
 55. N. P. It is not necessary for the plaintiff to give formal notice of the execution of the writ;
 and if the jury be summoned impartially, and the inquisition be made in a fair and open
 manner.

“ tices

" tices of the peace, at the next general quarter sessions,
 " which shall be holden within the limit where the same shall
 " lie, after such order made, or proceeding had, as aforesaid,
 " upon giving ten days notice, in writing, of such appeal
 " to the surveyor and party interested in such inclosure, it
 " there shall be sufficient time for that purpose; if not, such
 " appeal may be made upon the like notice to the next sub-
 " sequent quarter sessions of the peace; which courts of
 " quarter sessions are hereby respectively authorised and im-
 " powered to hear and finally determine such appeal; and
 " if no such appeal be made, or, being made, such order
 " and proceedings shall be confirmed by the said court, the
 " said inclosures may be made, and the said ways stopped,
 " and the proceedings thereupon shall be binding and con-
 " clusive to all persons whomsoever; and the new highway,
 " bridleway, or footway, so to be appropriated and set out,
 " shall be, and for ever after continue, a publick highway,
 " bridleway, or footway, to all intents and purposes what-
 " soever; but no inclosures of such old highways or bridle-
 " way, or stoppage of such footway, shall be made, until such
 " new highways, bridleway, or footway, shall be completed,
 " and put into good condition and repair, and so certified by
 " two justices of the peace, upon view thereof, which certi-
 " ficate shall be returned to the clerk of the peace, and in-
 " rolled amongst the records of sessions; but from and after
 " such certificate, such old highways, bridleway, or footway,
 " shall and may be stopped up, and the soil of such old high-
 " ways or bridleway sold, in the manner, and subject to the
 " reservations and restrictions herein-before mentioned with
 " respect to highways to be enlarged or diverted by virtue of Cont- 34
 " this act: and where any highway, bridleway, or footway,
 " hath been diverted and turned above twelve months, either
 " from necessity, where the same have been destroyed by
 " floods, or slips of the ground on which they were made,
 " or from other causes and motives, if new highways, bri-
 " dleways, or footways, have been made in lieu thereof, Vol. Douglas
 " nearer or more commodious than the same, and the same 740.
 " have been acquiesced in, and no suit or prosecution hath B. R.
 " been commenced for the diverting or turning the same, 2 S.
 " every new highway, bridleway, or footway, set out and L. V.
 " used in the place of that so diverted and turned, shall from
 " henceforth be the publick highway, bridleway, or foot-
 " way, to all intents and purposes whatsoever; and all per- D. O.
 " sons liable to the repair of any such old highways, bridle-
 " way, or footway, so diverted and turned, or to be diverted
 " and turned, as aforesaid, shall, in the same manner, be and
 " continue liable to the repair of such new highways, bri-
 " dleway, or footway, except where any agreement shall
 " have been made relative to such repairs between the parties
 " interested

“ interested therein, which hath laid the burthen thereof,
 “ or any part thereof, upon any other person or persons, in
 “ which case the same shall be observed.”

How the old
 highways or the
 lands lying be-
 tween the fences
 inclosing the
 same shall be
 disposed of.

† *Sect. 32.* But it is provided by the said statute, par. 26.
 “ That no common land, lying between the fences of any
 “ old highway to be stopped up or inclosed by virtue of this
 “ act, shall be inclosed; and where the land lying between
 “ the fences of such highway, not being common land, shall,
 “ upon a medium, exceed thirty feet in breadth, and not ex-
 “ tend to fifty feet in breadth, the same shall not be stopped
 “ up or inclosed, until satisfaction shall be made to the owner
 “ of such land, for so much thereof as shall exceed the said
 “ breadth of thirty feet; and if the parties cannot agree in the
 “ satisfaction so to be made, the same shall be adjusted by the
 “ said justices, or the jury, if a jury shall be impanelled; and if
 “ the land between the fences inclosing such highways, not
 “ being common land, shall exceed fifty feet in breadth upon
 “ a medium, or if the said old road, so to be diverted or
 “ turned, shall lie through the open field or ground belonging
 “ to any particular person or persons, such person or persons,
 “ and also the person or persons intitled to the land between the
 “ fences on the side of such highway, shall respectively hold and
 “ enjoy the land and soil of such old highway, and pay to the
 “ surveyor, for the use of the highways, so much money as
 “ shall be agreed upon between the parties; or if they can-
 “ not agree, so much as shall be deemed and adjudged by the
 “ said justices, or jury, if such jury shall be impanelled as
 “ aforesaid, to be adequate to the purchase of it, estimating
 “ such highway at thirty feet in breadth, upon an average.

Where old foot-
 ways shall be
 diverted, how
 the same shall
 be adjusted,
 and the lands
 through which
 they lay shall
 be disposed of.

† *Sect. 33.* And it is further enacted, par. 21. “ That
 “ where any footway shall be diverted by virtue of this act
 “ through the land belonging to the same person who owned
 “ the land through which such old footway lay, the same shall
 “ be adjudged and deemed an exchange only, and no satisfac-
 “ tion or compensation shall be made, unless the land to be
 “ used for such new footway shall be of greater length, and
 “ of greater value, than the land used for such old footway;
 “ and where the said footway shall not be turned through the
 “ lands belonging to the same person, the damage occasioned
 “ by such old footway to the lands through which it lay, if the
 “ parties interested shall not agree in adjusting the same, shall
 “ be adjudged by two indifferent persons, the one to be named by
 “ the owner of the land, and the other by the said two justices;
 “ and if the persons so to be nominated cannot agree therein,
 “ they shall chuse some third person to adjudge the same, whose
 “ determination shall be final; and the money at which such
 “ damages shall be assessed shall be applied in making satis-
 “ faction

“ faction to the owner or owners of the land through which
 “ such new footway shall be made.

† *Stat. 34.* And it is further enacted by the said statute,
 par. 22. “ That if in any parish, township, or place,
 “ where any highway shall be diverted and turned by virtue
 “ of this act, it shall appear to the justices, who are hereby
 “ authorised to view or inquire into the same, that there are
 “ other highways within such parish, township, or place,
 “ besides that so to be diverted and turned, which may, with-
 “ out inconvenience to the publick, be diverted into such new
 “ highway hereby authorised to be made, or into any other
 “ highway or highways within such parish, township, or place,
 “ and the charge of repairing such highway or highways
 “ may be thereby saved to such parish, township, or place;
 “ it shall and may be lawful for such justices to order such
 “ highway or highways, which shall appear to them unneces-
 “ sary, to be stopped up, and the soil thereof sold, in such
 “ manner, and subject to such restrictions, and such right of
 “ appeal to the party or parties aggrieved thereby, as are
 “ herein-before respectively directed and given concerning the
 “ highways to be stopped up or inclosed.”

Justices to order
unnecessary
highways to be
stopped up.

† *Stat. 35.* As to the fourth general Head of this Chapter,
viz. In what manner the surveyors of the highways shall be
 appointed, it is enacted by the 13 Geo. 3. c. 78. s. 1.
 “ That upon the twenty-second day of September, in every
 “ year, unless that day shall be Sunday, and then on the day
 “ following, the constables, headboroughs, tythingmen,
 “ churchwardens, surveyor of the highways, and household-
 “ ers, being assessed to any parochial or publick rate of
 “ every parish, township, or place, shall assemble to-
 “ gether at the church or chapel, or if there shall be
 “ no church or chapel, then at the usual place of pub-
 “ lick meetings for such parish, township, or place, at
 “ the hour of eleven in the forenoon; and the major part
 “ of them, so assembled, shall make a list of the names of
 “ at least ten persons living within such respective parishes,
 “ townships, or places, who, each of them have an estate in
 “ lands, tenements, or hereditaments, lying within such re-
 “ spective parish, township, or place, in their own right, or
 “ in the right of their wives, of the value of ten pounds by
 “ the year; or a personal estate of the value of one hundred
 “ pounds; or are occupiers or tenants of houses, lands, te-
 “ nements, or hereditaments, of the yearly value of thirty
 “ pounds; and if there shall not be ten persons having such
 “ qualifications as aforesaid, then they shall insert in such list
 “ the names of so many of such persons as are so qualified,
 “ as above required, together with the names of so many of

On the 22d
September a list

Qualifications of
surveyors.

A duplicate of
such list shall
be transmitted
to one of the
justices, and the
original list to
the special ses-
sions, &c.

Notices to the
persons to be
called in the list.

The justices are
to cause a copy
of the list to be
sent to the con-
stables, headbor-
oughs, or tything-
men, of every such
parish, township, or
place, at least ten
days before the
holding of the said
session; and the
said justices, then and
there, from the said list, according to their discre-
tion, shall appoint (15) one,

(15) The justices
will not com-
pel the justices
to appoint a
surveyor out of the
list returned to
them by the pa-
rish, or place, if
they have been
previously ap-
pointed by the
justices, or if
they are not
of the

parish, or place, but they seemed to incline very strongly that it was not absolutely necessary that the constables, headborough, tythingman, &c. as mentioned in the act, should be present, but that the legislature only meant it to be a full parochial meeting, without intending that each of the officers should be such essential constituent parts of it, that the acts of the meeting would be annulled if one could be, the absence of those officers. 4 Burr. 2457.

the most sufficient and able inhabitants of such parish, town-
ship, or place, not so qualified, as shall make up the num-
ber ten, if so many can be found; if not, so many as shall
be there resident, to serve the office of surveyor of the
highways: and the constable, headborough, or tything-
man, of such parish, township, or place, shall, within
three days after such meeting, transmit a duplicate of such
list to one of the justices of the peace within the limit of
the county, riding, division, hundred, city, corporation,
precinct, or liberty, where such parish, township, or place,
shall lie, living in or near the same; and shall also return
and deliver the original list, made and agreed upon at such
meeting, to the justices of the peace, at their special sessions
to be held for the highways within that limit, in the week
next after the Michaelmas general quarter sessions of the
peace in every year; and shall also, within three days after
making the said list, give personal notices to, or cause no-
tices in writing to be left at the places of abode of, the se-
veral persons contained in such list, informing them of
their being so named, to the intent that they may severally
appear before the justices at the said special sessions, to ac-
cept such office, if they shall be appointed thereto, or to
shew cause, if they have any, against their being ap-
pointed: and the said justices are hereby authorised and re-
quired to hold such special sessions at such convenient place
or places, within their respective limits, as they, in their
discretion, shall judge proper; and to give notice of the
time and place where they intend to hold the same, to the
constables, headboroughs, or tythingmen, of every such
parish, township, or place, at least ten days before the
holding of the said session; and the said justices, then and
there, from the said list, according to their discretion, and
the urgency of the parish, township, or place respectively,
by warrant under their hands and seals, shall appoint (15) one,
two, or more, of such persons as aforesaid, if he or they
shall, in the opinion of such justices, be qualified for the
office of surveyor; if not, one, two, or more of the other
substantial inhabitants or occupiers of lands, tenements,
woods, tithes, or hereditaments, within such parish, town-
ship, or place, living within three miles thereof, and with-
in the same county, fit and proper to serve the office of
surveyor of the highways for such parish, township, or
place, if any such can be found; which appointment shall,
by the constables, headboroughs, or tythingmen aforesaid,

" be

" be notified to every person so appointed by the said justices,
 " within three days after such appointment, by serving him
 " with the said warrant, or by leaving the same, or a true
 " copy thereof, at his house, or usual place of abode; and
 " every person so appointed, if he accepts the said office, shall
 " be surveyor of the highways for the said parish, township,
 " or place for the year ensuing, and shall take upon him,
 " and duly execute the office aforesaid; and the said justices
 " shall then and there give such of the said surveyors as shall
 " personally appear before them a charge, for the better per-
 " formance of their duty, according to the directions of this
 " act: and if any of the said persons, so appointed, whose
 " names were contained in such list, and who were served
 " with the said notice, shall refuse or neglect to appear at the
 " said special sessions, and accept the said office, if appointed
 " thereto, in manner aforesaid, or shall not, within six days
 " after being served with such warrant of appointment,
 " signify his acceptance thereof, either in person or by
 " writing, to one of the said justices, he shall forfeit five
 " pounds; and in case any person so appointed by the said
 " justices, whose name was not contained in such list, shall
 " refuse or neglect to accept the said office, or shall not, with-
 " in six days after being served with such appointment, shew
 " to one of the justices signing such appointment suf-
 " ficient cause why he should not serve such office, he shall
 " forfeit fifty shillings: provided that no person who
 " hath been appointed and served the office of surveyor for
 " one year, shall be liable to be appointed surveyor for the
 " same parish, township, or place, within three years from
 " the time of such first appointment and service, unless he
 " shall consent thereto; but if no such list shall be made and
 " returned, or if the said justices shall make such appoint-
 " ment as aforesaid, and the person or persons so appointed
 " shall refuse to serve the said office, the said justices, or any
 " two of them, shall and may, and are hereby required, at
 " the said special sessions, or at some subsequent special ses-
 " sions, to be held within one month after, to nominate and
 " appoint some other person or persons to be surveyor of such
 " parish, township, or place, whom they shall judge proper
 " to execute that office, and shall and may fix such salary to
 " be paid to such surveyor, to be appointed as herein last be-
 " fore mentioned, out of the said forfeitures, and all other
 " forfeitures, fines, penalties, assessments, and compositions,
 " to be paid, levied, and raised, under the authority of this
 " act, within such parish, township, or place respectively,
 " as such justices shall think fit, not exceeding one eighth part
 " of what shall have been raised by an assessment of sixpence
 " in the pound, for the use of the highways within such pa-
 " rish, township, or place, where any such assessment shall

Which appoint-
ment shall be
notified by the
constables.

And the sur-
veyor hold his
office for a year.

Penalty on re-
fusing to serve.

No person who
has served one
year, to be ap-
pointed again
within 3
years for same
place, without
his consent.

If no such list
be made, or the
person appoint-
ed refuse to
serve, another
person may be
appointed at a
subsequent spe-
cial sessions,
and a salary
fixed.

“ have been raised, and observing the same restriction, as
 “ near as they can, from the best information they shall be
 “ able to get of the probable amount of such an assessment,
 “ where none hath been already made; and the said justices
 “ shall and may, if they think fit, require the constables,
 “ headboroughs, tythingmen, and surveyor, of every such
 “ parish, township, and place, or any of them, to return to
 “ them, at such time and place as they shall appoint, an ac-
 “ count, in writing, of the sum which such assessment of fix-
 “ pence in the parish hath raised, or will, in his or their
 “ opinion, raise within such parish, township or place: and
 “ if the constables, headboroughs, tythingmen, church-
 “ wardens, surveyors of the highway, and such householders
 “ as aforesaid; of any parish, township or place, shall ne-
 “ glect or refuse to make such list as aforesaid; or if the con-
 “ stable, headborough or tythingman, of any parish, town-
 “ ship, or place, shall not return the said list of names,
 “ when made, and such duplicate thereof as aforesaid, and
 “ give such notice or notices, and serve such warrant or
 “ warrants as in this act is directed; or if the said constable,
 “ headborough, tythingman, and surveyor, or any of
 “ them, shall neglect to return such account of the amount
 “ of such assessment as aforesaid; when so required as aforesaid,
 “ every constable, headborough, tythingman, church-
 “ warden, or surveyor, so neglecting or refusing, in any of the
 “ said cases, shall, for every such default respectively, forfeit
 “ the sum of forty shillings.

Act time, to
 be made and
 written.

Penalty on
 constables.

How the surveyor
 to be appointed,
 penalty for re-
 fusal to serve,
 and consequences
 thereof if he
 refuse to do so.

† And it is further enacted by the said statute, par. 2. “ That
 “ in all cases where the said justices, upon neglect, or refusal
 “ of the person so nominated surveyor as aforesaid to accept
 “ the said office, shall appoint any other person for such sur-
 “ veyor, with a salary as aforesaid, the said justices shall, and
 “ are hereby required to appoint one substantial inhabitant of
 “ such parish, township, or place, for assistant to such sur-
 “ veyor, in the several matters, and for the several purposes
 “ hereafter mentioned, until the next annual appointment of
 “ surveyors, according to the directions of this act; and
 “ if the person so appointed assistant shall, upon notice of
 “ such appointment, refuse to accept that office, he shall for-
 “ feit the sum of fifty shillings: and, in that case, it shall and
 “ may be lawful for such justices to appoint any other sub-
 “ stantial inhabitant of such parish, township, or place, for
 “ assistant to such surveyor, in manner and for the time aforesaid;
 “ and if such second appointed assistant shall decline or
 “ refuse to accept the said office, he shall, in like manner,
 “ forfeit the sum of fifty shillings; and the said justices shall
 “ and may appoint any other person, inhabiting in such parish,
 “ town-

“ township, or place, assistant to such surveyor, who shall be
 “ intitled to the said forfeitures herein last before mentioned,
 “ and also to some further allowance by way of salary, (to be
 “ paid as the surveyor’s salary is hereby directed to be paid),
 “ if the said justices shall think any such salary necessary, and
 “ shall order the same, which they are hereby authorised to
 “ do: provided, that no person so appointed assistant for one
 “ year shall be liable to be appointed assistant for the same pa-
 “ rish, township, or place, within three years next following
 “ such first appointment, without his consent.

† And further, by par. 3. “ That the surveyor of every pa-
 “ rish, township, and place, who shall not reside therein, but
 “ shall be appointed with such salary as aforesaid, shall, if re-
 “ quired by the churchwarden, overseer of the poor, or any
 “ principal inhabitant of the parish, township, or place, for
 “ which he shall be so appointed surveyor, at the time of his
 “ appointment, or within fourteen days after, give a bond
 “ upon paper, without stamp thereupon, to some proper
 “ person within such parish, township, or place, to be no-
 “ minated by the said justices, with sufficient surety, to ac-
 “ count for the money which shall come to his hands as sur-
 “ veyor, according to the directions of this act; which bond
 “ shall be good and effectual in law.

The surveyor to
 give bond for the
 money he shall
 receive.

† Sect. 36. And it is further enacted by the said statute, par. 5.
 “ That if two parts out of three of those so to be assembled
 “ in any such parish, township, or place, for the nomination
 “ of surveyors, shall agree in the choice of any particular per-
 “ son of skill and experience, to serve the said office, and in
 “ the settling of a certain salary for his trouble therein, and
 “ shall return the name of such person, together with the list
 “ herein-before directed, to the sessions, to be held in the
 “ week next after the Michaelmas quarter sessions; the said
 “ justices, if they shall think proper, may appoint such per-
 “ son to be surveyor for such parish, township, or place, and
 “ allow him the salary mentioned in such agreement, which
 “ shall be raised and paid in the same manner as the salary
 “ herein-before mentioned is directed to be raised and paid;
 “ and in case any surveyor to be appointed under the authority
 “ of this act shall die, or become incapable of executing that
 “ office, before such next special sessions for appointing sur-
 “ veyors, the said justices, or any two of them, shall and
 “ may, at some special sessions, nominate and appoint such
 “ person or persons as they shall think proper, to execute the
 “ said office, until such next special sessions for appointing
 “ surveyors, as aforesaid; and, if such deceased surveyor had
 “ a salary, they may allow the same salary to his successor, in

How the justices
 shall appoint the
 surveyor elected
 by the inhabi-
 tants.

“ pro-

“ proportion to the time he shall serve the said office; and if
 “ the said justices of the peace, at their said special sessions,
 “ or at any time afterwards, pursuant to the powers of this
 “ act, shall appoint more than one person for surveyor of any
 “ parish, township, or place, all and every person or persons
 “ so appointed, shall be comprehended under the word *Surveyor*
 “ *veyer* in every part of this act. }
 “

Justices of ci-
 ties, &c. only
 to allow such sa-
 laries as shall be
 fixed by inha-
 bitants.

† Provided, by par. 55. “ That nothing in this act con-
 “ tained shall authorise or empower, or be deemed, construed,
 “ or taken to authorise and empower, any justice or justices
 “ of the peace, for any city, town corporate, or borough, to
 “ fix or allow any salary to or for any surveyor to be appoint-
 “ ed by any such justice or justices, other than and except such
 “ salary as shall be settled and agreed upon by two parts out of
 “ three of the persons assembled in the parish, township, or
 “ place, within such city, town corporate, or borough, for
 “ which such surveyor shall be appointed, pursuant to the di-
 “ rections of this act.

(16) Vide Sup.
 p. 352.

Duty of the as-
 sistant surveyor.

† *Sec.* 37. As to the fifth general Head of this Chapter,
 viz. In what manner the surveyors of the highways ought to
 execute their office, it is enacted by the same statute of
 13 Geo. 3. c. 78. s. 4. “ That the assistant, so to be no-
 “ minated and appointed, (16) shall assist the said surveyor;
 “ whenever requested by him, in calling in and attending the
 “ performance of the statute-duty; in collecting the compo-
 “ sitions, fines, penalties, and forfeitures; in making and
 “ collecting the assessment; in making out and serving the
 “ notices authorised by this act; and in such other matters
 “ and things as shall be reasonably required of him by the
 “ surveyor, in the execution of his office as surveyor, pur-
 “ suant to this act: and the said assistant shall account with,
 “ and pay to, the surveyor, or to his order, all the money
 “ which shall come to his hands as assistant, by the means
 “ as aforesaid; and, in default thereof, he shall forfeit double
 “ the value of the money by him so received, and not so paid
 “ and accounted for; and if the said assistant shall wilfully ne-
 “ glect or make default in the performance of any of the duty
 “ required from him by this act, he shall forfeit, not exceed-
 “ ing five pounds, nor less than forty shillings, at the discre-
 “ tion of the justice or justices of the limit within which such
 “ assistant shall be appointed: and the said surveyor shall send
 “ orders, in writing, upon the said assistant, for the pay-
 “ ment of all sums due to any person or persons, for work or
 “ materials, which amount to forty shillings, or upwards;
 “ and the said surveyor shall not be responsible for any sum or
 “ sums of money which shall be received by the said assis-
 “ tant, and shall not be actually paid to such surveyor, or to
 “ his order as aforesaid.

Sec.

† *Stat.* 38. And also, it is further enacted by the said statute, par. 12. " That the surveyors shall, as they shall judge proper, view all the common highways, trunks, tunnels, plats, hedges, ditches, banks, bridges, causeways, and pavements, within the parish, township, or place, for which they shall be appointed surveyors; and in case they shall observe any nuisances, encroachments, obstructions, or annoyances, made, committed, or permitted, in, upon, or to the prejudice of them, or any of them, contrary to the directions of this act, they shall give, or cause to be given, to any person or persons, doing, committing, or permitting the same, personal notice, or notice in writing, to be left at his, her, or their usual place or places of abode, specifying the particulars wherein such nuisances, defaults, obstructions, or annoyances, consist; and if such nuisances, obstructions, or annoyances shall not be removed, and the ditches, drains, gutters, and water courses aforesaid effectually made, scoured, cleansed, and opened, and such trunks, tunnels, plats, and bridges, made and laid, and such hedges properly cut and pruned, within twenty days after such notice of the same respectively given as aforesaid, then the said surveyors shall remove such nuisances, obstructions, or annoyances, and open, cleanse, and scour such ditches, gutters, and water courses, and make or amend such trunks, tunnels, plats, or bridges, and cut and prune such hedges, for the benefit and improvement of the said highways; and the person or persons so neglecting to make or open and cleanse such ditches, gutters, or water courses, or to cut or prune such hedges, during the time aforesaid, after such notice given, shall forfeit, for every foot in length, which shall be so neglected, the sum of one penny; and the said surveyors shall be reimbursed what charges and expences they shall be at in removing such nuisances, obstructions, or annoyances, and making or opening, cleansing and scouring, such ditches, gutters, and water courses, and in making or amending such trunks, tunnels, plats, or bridges, and in cutting and pruning such hedges respectively, by the person or persons who ought to have done the same, over and above the said forfeiture; and in case such person or persons shall, upon demand, refuse or neglect to pay the said surveyor his charges and expences occasioned thereby respectively, and also the said forfeiture of one penny *per* foot, then the said surveyor shall apply to any justice of the peace, and, upon making oath before him of notice being given to the defaulter in manner aforesaid, and of the said work being done by such surveyor, and of the expences attending the same, the said surveyor shall be repaid by such person or persons all such his said charges as shall be allowed to be reasonable by the said justice; or, in

Surveyors duty in view of highways, in respect to nuisances, &c.

Vide Salk. 357. Where it was adjudged on the 22 Car. 2. c. 12. par. 12, that the justices ought to fix the particular days, and not generally appoint the time between such a day and such a day.

" de-

“ default of payment thereof on demand, the same shall be
 “ levied in such manner as the penalties and forfeitures hereby
 “ inflicted are directed to be levied.”

How highways
 by tenure, &c.
 may be ordered
 to be repaired.

+ Sect. 39. And it is further enacted by the said statute,
 par. 23. “ That every surveyor shall give information upon
 “ oath to the said justices, or any two or more of them, of all
 “ such highways, and of all bridges, causeways, or pavements,
 “ upon such highways, as are out of repair, and ought to be
 “ repaired by any person or persons, bodies politick or cor-
 “ porate, by reason of any grant, tenure, limitation, or appoint-
 “ ment, of any charitable gift, or otherwise howsoever; and
 “ the said justices shall limit a time for repairing the same, of
 “ which notice shall be given by the said surveyor to the occu-
 “ pier or occupiers of the lands or tenements liable to the bur-
 “ then of such repairs, or to such other person or persons, bo-
 “ dies politick or corporate, as are chargeable with the same;
 “ and if such repairs shall not be effectually made within the
 “ time so limited, the said justices shall, and are hereby requir-
 “ ed to present such highways, bridges, causeways, or pave-
 “ ments, to out of repair, together with the person or persons,
 “ bodies politick or corporate, liable to repair the same, at
 “ the next general quarter sessions of the peace for the county
 “ wherein such highway shall lie; and the justices at such
 “ quarter sessions may, if they see just cause, direct the pro-
 “ secution to be carried on at the general expence of such li-
 “ mit, and to be paid out of the general rates within the
 “ same.”

V. b. 1. B. 1. c.
 62.

Justices may
 order highways
 to be repaired
 by the occupiers.

+ And it is further enacted by the said statute, par. 25. “ That
 “ the said justices, at any special sessions to be held by virtue
 “ of this act, may, by writing under their hands and seals, or-
 “ der and appoint those highways (not being turnpike roads),
 “ which in their opinion do most want repair within their ju-
 “ risdiction, to be first amended, and at what time, and in what
 “ manner, the same shall be amended; according to which or-
 “ der, if such there be, all and singular the respective surveyors
 “ of the said highways are hereby required to proceed within
 “ their respective liberties.”

Directions how
 highways may
 be erected.

+ And, for the better convenience of travellers where several
 highways meet, it is further enacted in par. 26. “ That the
 “ said justices, at some special sessions to be held for the pur-
 “ poses of this act, shall issue their precept to the surveyor of
 “ the highways for any parish, township, or place, where se-
 “ veral highways meet, and there is no proper or sufficient di-
 “ rection post, or stone, already fixed or erected, requiring him
 “ forthwith to cause to be erected or fixed, in the most conve-
 “ nient

“ nient place where such ways meet, a stone or post, with in-
 “ scriptions thereon, in large legible letters, painted on each
 “ side thereof, containing the name or names of the next mar-
 “ ket town or towns, or other considerable place or places,
 “ to which the said highways respectively lead ; and also at the
 “ several approaches or entrances to such parts of any high-
 “ ways as are subject to deep or dangerous floods, graduated
 “ stones or posts, denoting the depth of water in the deepest
 “ part of the same, and likewise such direction posts, or stones,
 “ as the said justices shall judge to be necessary, for the guiding
 “ of travellers in the best and safest tract through the said floods
 “ or waters ; and the said surveyor shall be reimbursed the ex-
 “ pences of providing and erecting the same respectively out
 “ of the monies which shall be received by him or them, pur-
 “ suant to the directions of this act ; and in case any surveyor
 “ shall, by the space of three months after such precept to him
 “ directed and delivered, neglect or refuse to cause such stones
 “ or posts to be fixed, as aforesaid, every such offender shall
 “ forfeit the sum of twenty shillings.”

† *Sec. 40.* And, for the better repairing, and keeping in repair, the said highways, and providing of materials for that purpose, it is enacted, by par. 27. “ That it shall and may be lawful to and
 “ for every surveyor, to be appointed as aforesaid, to take and
 “ carry away, or cause to be taken and carried away, so much
 “ of the rubbish or refuse stones of any quarry or quarries, ly-
 “ ing and being within the parish, township, or place, where
 “ he shall be surveyor, (except such as shall have been got by
 “ the surveyor of any turnpike road), without the licence of
 “ the owner or owners of such quarries, as they shall judge ne-
 “ cessary for the amendment of the said highways, but not to
 “ dig or get stone in such quarry without leave of the owner
 “ thereof ; and also that it shall and may be lawful for every
 “ such surveyor, for the use aforesaid, in any waste land or com-
 “ mon ground, river or brook, within the parish, township, or
 “ place, for which he shall be surveyor, or within any other pa-
 “ rish, township, or place, wherein gravel, sand, chalk, stone, or
 “ other materials, are respectively likely to be found, in case suf-
 “ ficient cannot be conveniently had within the parish, town-
 “ ship, or place, where the same are to be employed, and suffi-
 “ cient shall be left for the use of the roads in such other pa-
 “ rish, township, or place), to search for, dig, get, and carry
 “ away the same, so that the said surveyor doth not thereby di-
 “ vert or interrupt the course of such river or brook, or pre-
 “ judice or damage any building, highway, or ford, nor dig or
 “ get the same out of any river or brook within the distance of
 “ one hundred feet above or below any bridge, nor within
 “ the like distance of any dam or wear ; and likewise to gather
 “ stones lying upon any lands or grounds within the parish,
 “ township,

Material where
 and in what
 place or to be
 taken.

Without making satisfaction.

But satisfaction to be made for damages done in taking them away.

Not to extend to stones thrown up by the sea, called Beach.

If sufficient materials cannot be found in waste lands, &c. the surveyor may take them from several or inclosed lands or grounds.

Making satisfaction to the owners.

township, or place, where such highway shall be, for such service and purpose, and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways, without making any satisfaction for the said materials; but satisfaction shall be made for all damages done to the lands or grounds of any person or persons, by carrying away the same, in the manner herein after directed, for getting and carrying materials in inclosed lands or grounds; but no such stones shall be gathered without the consent of the occupier of such lands or grounds, or a licence from a justice of peace for that purpose, after having summoned such occupier to come before him, and heard his reasons, if he shall appear and give any, for refusing his consent."

† Provided, by par. 28. "That nothing in this act contained, relative to the gathering or getting of stones, shall extend to any quantity of land, (being private property,) covered with stones thrown up by the sea, commonly called beach."

† *Sec. 41.* And it is further enacted by the said statute, par. 29. "That every such surveyor, for the use aforesaid, may search for, dig, and get sand, gravel, chalk, stone, or other materials, if sufficient cannot conveniently be had within such waste lands, common grounds, rivers, or brooks, in and through any of the several or inclosed lands or grounds of any person or persons whomsoever, within the parish, township, or place, where the same shall be wanted, or by licence from two justices of the peace, at a special sessions, within any other parish, township, or place, adjoining or lying near to the highway for which such materials shall be required, if it shall appear to such justices that sufficient materials cannot be conveniently had in the parish, township, or place, where such highways lie, or in the waste lands or common grounds, rivers or brooks, of such adjacent parish, township, or place, and that a sufficient quantity of materials will be left for the use of the parish, township, or place, where the same shall be, (such lands or grounds not being a garden, yard, avenue to a house, lawn, park, paddock, or inclosed plantation), and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways; the said surveyor making such satisfaction for the damage to be done to such lands or grounds by the getting and carrying away the same, as shall be agreed upon between him and the owner, occupier, or other person interested in such lands or ground respectively, in the presence,"

“ fence, and with the approbation of two or more substantial inhabitants of such parish, township, or place; and in case they cannot agree, then such satisfaction and recompence shall be settled and ascertained by order of one or more justice or justices of the peace of the limit where such land or ground shall lie: and in such places, where, from the want of other materials, burnt clay may be substituted in the place thereof, it shall and may be lawful for the surveyor to dig clay in such places as he is hereby authorized to dig chalk or gravel, and to dry the same upon the lands adjoining, and to burn the same upon any waste lands or common grounds, and to carry such clay in such manner as other materials are allowed to be carried by this act, upon making such satisfaction for the damages within the several inclosed lands or grounds where such clay shall be placed or carried, as herein directed with regard to other materials: provided, that when the owner of any such inclosed lands shall have occasion for any such materials lying within the same for the repair of any highway, or other roads or ways upon his estate, or which he shall be under obligation to repair, and shall give notice to such surveyor that he apprehends there will not be sufficient for those purposes, and also for the use of the publick highways; then, and in every such case, the surveyor shall not be permitted to dig or take such materials without the consent of such owner, or an order of two justices of the peace, after having summoned and heard the said owner or occupier, or his steward or agent; which justices are hereby authorized to enquire into the nature and circumstances of the case, and to permit or restrain such power, in such manner, and under such directions, as to them shall seem just.” (17)

In what manner satisfaction is to be settled.

Clay may be got and burnt into materials for repairing the highways.

(17) In an order for this purpose, it is not necessary that the name of the surveyor should be mentioned, nor that any certain number of days notice should appear to have been given to the occupier of the lands. Which notice, it is sufficient to state, was *left at his place of abode*. And notice to the occupier, and not to the owner, is enough. But it is necessary expressly to alledge, that materials, &c. were not to be found; and also, what materials cannot be found in the wastes, and what may be found in the private soil; for they cannot dig and try for it in the private soil; nor can they dig all over the estate for all materials, and the satisfaction ought to be awarded to the owner or occupier, or both, according to the case. 1 Burr. 382.

† *Stat. 42.* Also, it is enacted, par. 31. “ That if any surveyor, or person employed by him, shall, by reason of the searching for, digging, or getting any gravel, sand, stones, chalk, clay, or other materials for repairing any highways, make, or cause to be made, any pit or hole in any such lands or grounds, rivers or brooks, as aforesaid, wherein such materials shall be found, such surveyor, person or persons, shall forthwith cause the same to be sufficiently fenced off, and such fence supported and repaired, during such time as the said pit or hole shall continue open, and shall, within three days

If pits or holes are made in getting materials, the surveyor shall cause them to be filled up or fenced off.

- “ days after such pit or hole shall be opened or made, where
 “ no gravel, stones, or materials, shall be found, cause the
 “ same to be forthwith filled up, levelled, and covered with
 “ the turf or clod which was dug out of the same; and where
 “ any such materials shall be found, within fourteen days af-
 “ ter having dug up sufficient materials in such pit or hole,
 “ cause the same to be filled up, sloped down, or fenced off,
 “ and so continued; and every surveyor shall, within twenty
 “ days after he shall be appointed to that office, cause all the
 “ said pits and holes which shall then be open, and not likely
 “ to be further useful, to be filled up or sloped down, in man-
 “ ner aforesaid; and if they are likely to be further useful, he
 “ shall secure the same by posts and rails, or other fences, to
 “ prevent accidents to persons or cattle: and in case such sur-
 “ veyor, person or persons, shall neglect to fill up, slope down,
 “ or fence off, such pit or hole, in manner and within the time
 “ aforesaid, he or they shall forfeit the sum of ten shillings
 “ for every such default: and in case such surveyor, person or
 “ persons, shall neglect to fence off such pit or hole, or to slope
 “ down the same, as herein before directed, for the space of
 “ six days after he or they shall have received notice for either
 “ of those purposes from any justice of the peace, or from
 “ the owner or occupier of such several ground, river, or
 “ brook, or any person having right of common within such
 “ common or waste lands, as aforesaid, and such neglect and
 “ notice shall be proved upon oath before one or more of the
 “ said justices of the peace, such surveyor, person or persons,
 “ shall forfeit and pay any sum not exceeding ten pounds, nor
 “ less than forty shillings, for every such neglect to be de-
 “ termined and adjudged by such justice or justices, and to be
 “ laid out and applied in the fencing off, filling up, or sloping
 “ down, such pit or hole, and toward the repair of the roads
 “ in the parish, township, or place, where the offence shall
 “ be committed, in such manner as the said justice or justices
 “ shall direct and appoint; which forfeiture, in case the same
 “ be not forthwith paid, shall be levied as other forfeitures are
 “ herein after directed to be levied.”
- Or forfeit 10s. for every neglect.
- And for every neglect after notice
- A sum not exceeding 10 l. nor less than 40.
- How materials for another parish shall be removed.
- Damaging mills, &c.
- † Provided by par. 32. “ That no stone, gravel, or materials, to be dug for the use of any other parish, township, or place, than that wherein the same are found, shall be removed or carried from the place where they shall be so dug at any other time than between the first day of April and the first day of November, or in the time of hard frost in the winter season.”
- † Sect. 43. And it is further enacted, by par. 33. “ That if any person shall dig, or cause to be dug, materials for highways, contrary to the direction of this act, whereby
 “ any

Books, materials, tools, &c. to be delivered to the succeeding surveyor. New surveyor authorized to collect the arrears, &c.

The surveyor is authorized to collect the arrears of duty.

If surveyor dies, his executors, &c. shall pay out of the fund money, &c. to be paid to the justices clerks.

“ to by such justice shall have been explained and verified by
 “ proper evidence, to the satisfaction of the justices at such
 “ special sessions; and in case any articles contained in such
 “ accounts shall not be explained and proved to the satisfaction
 “ of such justices, they may disallow the same; and when-
 “ ever the said accounts shall be so settled and allowed, or
 “ disallowed, as aforesaid; all such books and assessments shall
 “ be transmitted to the churchwarden or overseer of the poor
 “ for such parish, township, or place, respectively, or, if the
 “ place be extra-parochial, then to some principal inhabitant
 “ thereof, to be kept for the use of such parish, township, or
 “ place; and the said surveyor shall forthwith deliver a du-
 “ plicate of such book and account, together with all sums of
 “ money as shall remain in his hands, and likewise all tools,
 “ materials, implements, and other things, as aforesaid, to
 “ the succeeding surveyor for such parish, township, or place,
 “ in case any new surveyor shall be appointed, or retain the
 “ same in his hands, and account for them in his next ac-
 “ count; if he shall be continued surveyor for such parish,
 “ township, or place, in the succeeding year; and the suc-
 “ ceeding surveyor is hereby required to recover, collect, and
 “ receive, all such sums of money which shall be due and ow-
 “ ing as aforesaid, by all such ways and means, as fully and
 “ effectually, to all intents and purposes, as the preceding sur-
 “ veyor could, might, or ought to have recovered, collected,
 “ or received the same: and in case such surveyor shall ne-
 “ glect to provide such book or books, or to enter such re-
 “ spective accounts and lists therein, or to deliver the said
 “ book or books, and such duplicate thereof, and such assis-
 “ sments, tools, materials, implements, and other things, in
 “ manner aforesaid, he shall, for every such offence, forfeit
 “ not exceeding five pounds, nor less than forty shillings; and
 “ in case he shall make default in the paying or accounting
 “ for the money so remaining in his hands, within the time,
 “ and according to the directions aforesaid, he shall forfeit
 “ double the value of the money which shall be adjudged by
 “ the said justices to be in his hands; and in case any such
 “ surveyor shall die before such respective accounts and lists
 “ shall be made out, or such monies, books, assessments,
 “ tools, materials, and implements, shall be so delivered and
 “ paid, the executors or administrators of such surveyor shall
 “ make out, pay, and deliver the same, in like manner, and
 “ under the like penalty, as such surveyor is hereby required
 “ and made subject and liable to; and every surveyor shall
 “ pay to the justices clerks, for the appointment and charge,
 “ the sum of one shilling; for the bond sixpence; and for the
 “ account so to be examined and taken, and for the oath so
 “ to be administered, the sum of one shilling, and no more;
 “ and if any person or persons shall receive any greater sum
 “ or

“ or fee for the business aforesaid than herein before mentioned, he shall forfeit the sum of ten pounds for every offence:”

† *Sec. 45.* And it is also enacted, by par. 50. “ That where a sufficient quantity of stone, gravel, chalk, or other materials, cannot be provided and carried by the labourers and teams required by this act to perform statute duty, the surveyor shall contract for the getting and carrying thereof, (in the presence of the said assistant, if any such shall be appointed), at a meeting to be held for that purpose, of which ten days notice in writing shall be given, by fixing the same upon the door of the church or chapel of the parish, township, or place, or if there be no church or chapel, at the most publick place there; which notice shall specify the work to be done, and the time and place for letting thereof; and if any surveyor shall have any part, share, or interest, directly or indirectly, in any such contract, or in any other contract or bargain for work or materials to be made, done, or provided, upon, for, or on account of any of the highways, roads, bridges, or other works whatsoever, under his care or management, or shall, upon his own account, directly or indirectly, let to hire any team, or sell or dispose of any timber, stone, or other materials, to be used or employed in making or repairing such roads, bridges, or other works, as aforesaid, (unless a licence, in writing, for the sale of any such materials, or to let to hire any such team, be first obtained from some justice of the peace within that limit), he shall forfeit, for every such offence, the sum of ten pounds, and be for ever after incapable of being employed as a surveyor with a salary, under the authority of this act.”

How materials may be contracted for.

† 46. And it is further enacted, by par. 51. “ That if any surveyor of the highways, after his acceptance of the said office, shall neglect his duty in any thing required of him by this act, for which no particular penalty is imposed, he shall forfeit, for every such offence, any sum not exceeding five pounds, nor less than ten shillings, at the discretion of the justice or justices having jurisdiction therein.”

Penalty upon the surveyor.

† And also, by par. 54. “ That the justices of the peace of all cities, corporations, boroughs, and other places, are hereby required to put in execution every part of this act within their respective jurisdictions.”

Justices of the peace to put the act in execution.

† *Sec. 47.* And it is recited, by par. 44. of the said statute, That whereas, by several acts of parliament concerning turnpike

Where the surveyor is to be paid for the tolls, he shall pay it to the treasurer.

the duty of the
surveyor of the
highways.

turnpike roads (19), a certain part of the duty called *statute* duty is or may be directed to be performed on such roads, and it may happen in some places, that the several persons liable thereto may have compounded for the same. It is therefore further enacted, "That in all such cases, the surveyor of highways, where such composition shall have been made, shall pay to the treasurer or surveyor of such turnpike roads a certain part of the composition money so received, to be proportioned according to the number of days duty which such person or persons was or were liable to perform on such turnpike road; which money shall be laid out and expended on such part of the said turnpike road as lies within the parish, township, or place, from which it was received, and not elsewhere; and if such surveyor of the highways shall refuse or neglect to pay to the treasurer or surveyor of such turnpike road such part of the said composition money so received by him, within twenty days after he shall have received the same, upon demand made by such treasurer or surveyor, the same shall and may be levied on the goods and chattels of such surveyor, in such manner as penalties and distresses are by this act authorized to be levied."

From the time
that a road is
made a turnpike.

As to the sixth general Head of this Chapter, viz. What shall be held to be a nuisance to the highway, I shall consider. And that shall be said to be such a nuisance at common law, and what by statute.

10. 1. 1. 1. 1.

Sec. 48. As to the first point, there is no doubt but that all injuries whatsoever to any highway, as by digging a ditch, or making a hedge overhanging it, or laying logs of timber in it, or by doing any other act, which will render it less convenient to the king's people, are publick nuisances at common law.

11. 1. 1. 1. 1.

Sec. 49. Altho' it seemeth to be clear, That it is no excuse for one who layeth such logs in the highway that he laid them only here and there, so that the people might have a passage by wheelings and turnings through the logs: yet it is said to be no nuisance for the inhabitants of a town to unload barrels, &c. in the street before the houses, by reason of the necessity of the case, unless they suffer them to continue there an unreasonable time, after they are unloaded.

12. 1. 1. 1. 1.

Sec. 50. There is no doubt but that it is a nuisance at common law to erect a new gate in a highway, as hath been more fully shewn in the precedent chapter. Also it seemeth clear, That it is a like nuisance to suffer the ditches adjoining to a highway to be foul, by reason whereof it is impaired, or to suffer the boughs of trees growing near the highway to hang over

1. 1. 1. 1. 1.
1. 1. 1. 1. 1.
1. 1. 1. 1. 1.

over the road, in such a manner as thereby to incommode the passage.

Sec. 51. As to the second point, *viz.* What shall be held to be a nuisance to the highway by statute; not only all the above mentioned nuisances, which are such at common law, are esteemed also nuisances by statute, but there is also one particular nuisance which is made such by statute, and doth not seem to be taken notice of by common law, and that is the drawing of a travelling carriage with more than six horses in length, the permitting whereof hath occasioned the carrying of such excessive loads in such carriages, that the weight thereof hath in many places rendered the roads unpassable.

As to the seventh general Head of this Chapter, *viz.* How such nuisances are to be removed and punished, I shall consider the following particulars: First, In what order hedges and ditches, adjoining to the highway, ought to be kept. Secondly, How far all trees and bushes are to be removed from the highway. Thirdly, In what manner all other annoyances obstructing the highway are to be removed. Fourthly, How far all persons are punishable for taking away things made use of for the benefit of the highway. Fifthly, How far they may be punished for drawing a carriage with more than five horses in length.

As to the first particular, *viz.* In what order hedges and ditches, adjoining to the highway, ought to be kept. It is said, That he who hath land next adjoining to a highway, is bound by common right to keep his ditch; but it is said, that he who hath land next adjoining to such land, is not bound by the common law to do, without some special prescription for that purpose; and perhaps it is the better opinion, That he who hath trees next adjoining to the highway, and hanging over it to the annoyance of the people, is bound by the common law to lop the same: and it seems clear, That any person may justify the lopping such trees, so far as to avoid the nuisance.

Sec. 53. However it is enacted by 13 Geo. 3. c. 78. That the possessor of the land next adjoining to every highway shall cut, prune, and plash their hedges, and also cut down or prune and lop the trees growing in or near such hedges or other fences, (except those trees planted for ornament or shelter, as hereafter mentioned) in such manner thereof respectively, and that the sun and wind may not be excluded from such highway to the damage thereof, within ten days after notice given by the surveyor for that purpose, or the surveyor shall make complaint thereof to some justice

“ of the limit, who shall summon the possessor of the said
 “ lands to some special sessions, to answer to the said com-
 “ plaint; and if it shall appear to the justices, that such pos-
 “ sessor had not complied with the requisites of this act, the
 “ said justices, upon hearing the surveyor and the possessor of
 “ such land, or his agent, (or in default of his appearance,
 “ upon having due proof of the service of such summons),
 “ and considering the circumstances of the case, may order
 “ such hedges to be cut, plashed, and pruned, and such trees
 “ to be cut down, or pruned in such manner, as may best
 “ answer the purposes aforesaid; and if the possessor of such
 “ lands shall not obey such order within ten days after the
 “ notice thereof, he shall forfeit two shillings for every
 “ twenty-four feet in length of such hedge which shall be so
 “ neglected to be cut and plashed, and two shillings for every
 “ tree which shall be so neglected to be cut down or pruned,
 “ and topped.”

On default, the
 surveyor may
 enter the land
 and do the work
 himself.

— *Sec. 54.* And it is further enacted, “ That the surveyor,
 “ in case of such default, shall cut, prune, and plash such
 “ hedges, and cut down or prune and lop such trees, in the
 “ manner directed by such order; and such possessor shall be
 “ charged with, and pay, over and above the said penalties,
 “ the charges and expences of doing the same; or, in default
 “ thereof, such charges and expences shall be levied, together
 “ with the said forfeitures, upon his or her goods and chattels,
 “ by warrant from a justice of peace, in such manner as is
 “ authorized for forfeitures incurred by virtue of this act.”

On the first to
 make the ditch
 and the surveyor.

+ *Sec. 55.* And it is further enacted, par. 8. “ That
 “ ditches, drains, or watercourses, of a sufficient depth and
 “ breadth, for the keeping all highways dry, and conveying
 “ the water from the same, shall be made, secured, cleaned,
 “ and kept open, and sufficient trunks, tunnels, plates, or
 “ bridges, shall be made and laid where any cartways, horse-
 “ ways, or footways, lead out of the said highways into the
 “ lands or grounds adjoining thereto, by the occupier of such
 “ lands or grounds; and every person who shall occupy any
 “ lands or grounds adjoining to, or lying near such highway
 “ through which the water hath used to pass from the said
 “ highway, shall open, cleanse, and scour, the ditches, wa-
 “ tercourses, or drains, for such water to pass without ob-
 “ struction; and that every person making default, at or ten
 “ days notice by the surveyor, shall forfeit ten shillings.”

When the old
 ditch is not
 sufficient,
 the surveyor
 may order it to
 be made.

+ *Sec. 56.* And it is further enacted, by par. 14. “ That
 “ where the ditches, gutters, or watercourses, shall not be
 “ sufficient to carry off the water which shall lie upon and
 “ annoy the highways, the surveyors, by the order of any one
 “ of

“ of the said justices, shall make new ditches and drains in and
 “ through the lands and grounds adjoining or lying near to
 “ such highways, or in and through any other lands or
 “ grounds, if it shall be necessary, for the more easy and ef-
 “ fectually carrying off such water from the said highways,
 “ and also to keep such ditches, gutters, or watercourses,
 “ scoured, cleaned, and opened; and the surveyors, and
 “ their workmen, are authorised to go upon the lands, for the
 “ purposes aforesaid.”

† *Stat.* 57. And it is further enacted, “ That the surveyors
 “ shall make proper trunks, tunnels, plats, bridges, or arches,
 “ over such ditches, gutters, or watercourses, for the conve-
 “ nient use and enjoyment of the lands or grounds through
 “ which the same shall be made, and keep the same in repair,
 “ and make satisfaction to the owner or occupier of such
 “ lands which are not waste or common, for the damages
 “ sustained thereby; to be settled and paid in such manner as
 “ the damages for getting materials in several or inclosed
 “ lands or grounds are hereafter directed to be settled and
 “ paid.”

Surveyors to
make trunks,
&c.

Stat. 58. As to the second particular, *viz.* How far all
 trees and bushes are to be removed from the highway, it ap-
 pears from the above mentioned *Act* of Winchester, *cap.* 1, *sec.* 1, *et seq.*
Chapter 5. “ That no small tree or bush, whereby a man may
 “ hurt to do hurt, ought to be suffered to stand within two
 “ hundred feet of either side of a highway leading from one
 “ market-town to another.”

† *Stat.* 59. And it is farther enacted, by 13 Geo. 3.
 c. 7. par. 6. “ That no tree, bush, or shrub, shall be per-
 “ mitted to stand or grow in any highway within the dis-
 “ tance of fifteen feet from the centre thereof (except
 “ for ornament or shelter to the house, building or court yard
 “ of the owner thereof); or hereafter to be planted within the
 “ distance aforesaid; but the same shall be respectively
 “ cut down, grubbed up, and carried away by the owner or
 “ occupier of the land or soil, where the same doth or shall
 “ stand or grow, within ten days after notice to him, or his
 “ steward or agent, given by the said surveyors, or any of
 “ them, on pain of ten shillings.”

No tree, bush,
or shrub, to
stand within 15
feet of the cen-
tre of a high-
way.

† *Stat.* 60. But it is also provided by the said statute,
 par. 13. “ That no person shall be compelled, nor any sur-
 “ veyor permitted to cut or prune any hedge, than between
 “ the last day of December and the last day of March; and
 “ that nothing in this act contained shall oblige any person to
 “ fell any timber trees, in hedges, at any time whatsoever,
 “ except

Notice of cut-
ting hedges, to
be given, &c.

“ except where the highways shall be ordered to be enlarged,
 “ or to cut down or grub up any oak trees growing within
 “ such highway, or in such hedges, except in the months of
 “ April, May, or June, or any ash, elm, or other trees, in
 “ any other months than in the months of December, Ja-
 “ nuary, February, or March.

S. 2. 61. As to the third particular, *viz.* In what manner
 all other annoyances obstructing the highway are to be re-
 moved; it seems clear, That by the common law any one
 may abate a nuisance to a highway, and to remove the nu-
 tance, but not convert them to his own use, as hath more
 fully been shewn in the precedent Chapter. Also it seemeth,
 That an heir may be indicted for continuing an incroachment,
 or other nuisance to a highway, begun by his ancestor, be-
 cause such a continuance thereof amounts in the judgment of
 law to a new nuisance.

S. 2. 62. But the common law, not having been thought
 to have provided sufficiently against nuisances of that kind, it
 is enacted by the above mentioned statute of 13 Geo. 3. c. 78.
 par. 9. “ That if any person shall lay, in any highway, any
 “ stone, timber, straw, dung, or other matter, or in makin-
 “ common, or cleansing, the ditches or watercourses, shall
 “ permit the soil or earth dug out of such ditches, drains, or
 “ watercourses, to remain in such highway, in such manner
 “ as to obstruct or prejudice the same, for the space of five
 “ days after notice thereof by the surveyor, he shall forfeit
 “ ten shillings.”

And it is further enacted, par. 10. “ That if any stone
 “ or timber, or any hay, straw, stubble, or other matter,
 “ for the stacking of manure, or on any other pretence what-
 “ soever, not tolerated by this act, shall be laid in any high-
 “ way, within the distance of fifteen feet from the centre
 “ thereof, and shall not, within five days after notice by the
 “ surveyor, or some person aggrieved thereby, be removed,
 “ the owner or possessor of the lands adjacent, or any other
 “ person whatsoever, by order from some justice, may re-
 “ move the said stone, timber, hay, straw, dung, or other
 “ matter, and have, take, and dispose of the same, to his
 “ and their own use.”

And by par. 11. for preventing obstructions in the said
 highways, “ That if any person shall wilfully set, place, or
 “ leave, any waggon, cart, or other carriage, or any plough
 “ or instrument of husbandry, in any of the said highways,
 “ (except during the reasonable time of loading or unloading,
 “ and standing as near the side of such highway as possible) so as to

“ m.”

“ interrupt or hinder the free passage of any other carriage,
 “ or of his majesty’s subjects, every person so offending shall
 “ forfeit ten shillings.”

† *Sec. 63.* And it is further recited by the above-mentioned statute of 13 Geo. 3. c. 78. par. 64. “ That whereas inconveniences have arisen from making hedges or other fences, and from ploughing or breaking up the soil of lands or grounds near the middle or centre of highways: for remedy thereof,” it is therefore enacted, “ That if any person shall
 “ incroach, by making any hedge, ditch, or other fence, on
 “ any highway, not being turnpike road, within the distance
 “ of fifteen feet from the middle or centre thereof, or shall
 “ plough, harrow, or break up the soil of any land or
 “ ground, or in ploughing or harrowing the adjacent lands
 “ shall turn his plough in or upon any land or ground
 “ within the distance of fifteen feet from the middle or centre
 “ of any highway, where the breadth of such highway is
 “ formed and marked, or described with certainty, and does
 “ not exceed in breadth thirty feet, he shall forfeit forty
 “ shillings, to such person who shall make information of
 “ the same; and the surveyor may cause such hedge, ditch,
 “ or fence to be taken down, or filled up, at the expence of
 “ the person to whom the same shall belong: and any justice
 “ of the limit, upon oath to him upon oath, may levy as
 “ well the expences of taking down such hedges, as the
 “ several penalties hereby imposed, by distress and sale of the
 “ offender’s goods and chattels.”

Penalty of In-
 croaching upon
 highways.

For encroachment
 by surveyor.

† And by par. 63. of the said statute for preventing obstructions, which frequently happen by stopping or enclosures on or near publick bridges, it is further enacted, “ That if any
 “ person collecting any tolls payable for passing over any
 “ publick bridge with carriages or cattle of any kind shall
 “ keep any victualling-house, alehouse, or other place of
 “ publick entertainment, or shall sell, or permit to be sold
 “ therein, any wine, beer, ale, cyder, spirituous liquors, or
 “ other strong liquors, by retail, he, being convicted by one
 “ witness, or his own confession, before any justice of the
 “ limit, shall forfeit five pounds.”

At house not
 for sale on
 publick bridge
 tolls are to be

† *Sec. 64.* As to the fourth particular, viz. How far all persons are punishable for taking away things made use of for the benefit of highways, it is recited by the above-mentioned statute of 13 Geo. 3. c. 78. par. 53. “ That whereas in some places it hath been and may be found necessary to secure horse causeways and foot causeways, by posts, blocks, or great stones, fixed in the ground, or by banks of earth cast up, or otherwise, from being broken up and spoiled with waggons, wains, carts, or carriages; and as several evil-disposed persons do or may wilfully or wantonly pull
 up,

Penalty for dis-
 turbing banks,
 causeways, posts,
 blocks, &c. &c.

up, cut down, and remove or damage the said posts, blocks, and great stones, so fixed, or to be fixed, as aforelaid, and drive carriages upon such banks and causeways, or against the sides thereof, and also dig or cast down the said banks, which are the securities and defence of the said causeways, whereby the causeways or banks are often ruined and destroyed; and such evil-disposed persons do or may break, damage, or throw down the stones, bricks, or wood, fixed upon the parapets or battlements of bridges, and do or may pull down, destroy, obliterate, or deface, any mile stone or post, graduated or direction post or stone, erected, or to be erected upon any highway:" It is enacted, "That every person guilty of any such offence, shall, upon complaint to any justice where the same shall be proved to be done, by the oath of one witness, or upon view of the justice himself, forfeit not exceeding five pounds, nor less than ten shillings; and in default of payment, shall be committed to the house of correction or such limit, to be whipped, and kept to hard labour not exceeding one calendar month, nor less than seven days. (20)

(20) The same
provisions are
made by 1 Geo.
3. c. 3.
c. 34.

§ 1. 65. As to the fifth particular, viz. How far persons may be punished for drawing a carriage with more than five horses in length, it is enacted, by 13 Geo. 3. c. 73. par. 56. "That no waggon, having the sole or bottom of the felles of the wheels of the breadth of nine inches, shall go or be drawn with more than eight horses; and that no cart, having the sole or bottom of the felles of the breadth of nine inches, shall be drawn with more than five horses; and that no waggon, having the sole or bottom of the felles of the breadth of six inches, and rolling on each side a surface or nine inches, shall go or be drawn with more than seven horses; and that no such waggon rolling a surface of six inches only, shall go or be drawn with more than six horses; and that no cart, having the sole or bottom of the felles of the wheels of the breadth of six inches, shall go or be drawn with more than four horses; and that no waggon having the sole or bottom of the felles of less breadth than six inches, shall go or be drawn with more than five horses; and that no cart having the sole or bottom of the felles of less breadth than six inches, shall go or be drawn with more than three horses upon highways, not being turnpike roads, under pain, that the owner of such waggon or cart respectively shall forfeit five pounds, and the driver not being the owner, ten shillings, for every horse or beast which shall be so drawing above the number hereby so respectively limited, to the sole use and benefit of the informer;—But carriages moving upon wheels

Distinction of
the number of
horses which
may draw the
same.

The Act
c. 20.
9 Geo. 3. c. 12.
1 Geo. 3. c. 11.
5 Geo. 3. c. 12.
B.
fines.
1 Geo. 3. c. 11.
7 Geo. 3. c. 11.

4 Burr. 2268.
Stevens v. Duf
frey.

" or

“ or rollers, of the breadth of sixteen inches on each side thereof, with flat surfaces, are hereby allowed to be drawn with any number of horses, or other cattle.” (a)

(a) Vide appendix at the end of this book how these carriages are favoured in the payment of tolls. Provisions for such additional horses how to be carried on.

† But it is provided, by par. 57. of the said statute, “ That no prosecution shall be commenced before a justice by information, for any forfeiture incurred by the owner or driver of any carriage, having a greater number of horses therein than are allowed by this act, unless within three days after the offence committed; and that no action shall be commenced for any such offence, unless within one calendar month; and that neither such information or action, unless notice shall be given by the informer to the driver of every such carriage, on the day upon which the offence shall be committed, of an intention to complain of such offence; and if it shall appear to the justice, that the offender lives so remote as to make it inconvenient to summon him to appear, the justice may leave the informer to his remedy by action at law.”

† And it is further provided, by par. 58. “ That the general quarter sessions, to be held in the week after *Michaelmas*, may license an increase of horses in carriages up any steep hill, or on any road not turnpike, over and above the number herein-before limited, if, upon inquiry into the state and condition of such roads, they shall find any additional number of horses necessary; and, from time to time, at any *Michaelmas* quarter sessions, to revoke, alter, or vary the same, as they shall think fit.”

Justices at quarter sessions may determine the number of horses.

† And it is further provided, by par. 59. “ That if it shall appear upon the oaths of credible witnesses, to the satisfaction of any justice, or of court of justice authorized to enforce the execution of this act, that any carriage could not, by reason of deep snow or ice, be drawn by the number of horses or beasts allowed; such justice, or court respectively, are hereby required to stop all proceedings for the recovery of any penalty incurred by drawing with a greater number than are hereby allowed; provided that the regulations concerning the number of horses, and wheels of carriages, shall not be deemed or construed to extend to carriages, employed only in carrying any one stone, block of marble, cable rope, or piece of metal, or piece of timber, or to such ammunition or artillery as shall be for his majesty's service; and that two oxen or horned cattle shall, for all the purposes of this act, be considered as one horse.”

Justices may stop proceedings for exceeding number of horses.

Vide *Stevens and Davis*, 4 B. & C. 220.

Carriages excepted out of this act.

Two oxen equal one horse.

† And by par. 60. for the better discovery of offenders, it is enacted, “ That the owner of every waggon, wain, cart, coach, b. printed on

The owner's name, &c. to be printed on all carriages.

“ coach, post-chaise, or other carriage let to hire, shall cause
 “ to be painted, upon some conspicuous part of his waggon,
 “ wain, or cart, and upon the pannels of the doors of all
 “ such coaches, post chaises, or other carriages, before the
 “ same shall be used upon any publick highway, his christian
 “ and surname, and the place of his abode, in large legible
 “ letters, and continue the same thereupon so long as such
 “ waggon, cart, coach, post-chaise, or other carriage, shall
 “ be used upon any such highway; and the owner of every
 “ common stage waggon or cart, employed in travelling stages
 “ from town to town, shall, over and above his or her christian
 “ and surname, paint, or cause to be painted, on the part,
 “ and in the manner aforesaid, the following words, “ COM-
 “ MON STAGE WAGGON, or CART, as the case may be,
 “ upon pain of forfeiting a sum not exceeding five pounds,
 “ nor less than twenty shillings.”

§ 4. 66. And it is further recited by the said statute of
 13 Geo. 3. c. 78. par. 61. “ That whereas many bad acci-
 dents happen, and great mischiefs are frequently done
 upon the streets and highways, by the negligence or wil-
 ful misbehaviour of persons driving carriages thereon;” it
 is therefore further enacted, That if the driver of any cart,
 “ car, pray, or waggon, shall ride upon any such carriage
 “ in any street or highway, not having some other person
 “ on foot, or on horseback, to guide the same, (such car-
 “ riages as are conducted by some person holding the reins
 “ of the horse or horses drawing the same excepted); or if
 “ the driver of any carriage whatsoever on any part of any
 “ street or highway shall, by negligence, or wilful misbeha-
 “ viour, cause any hurt or damage to any person or carriage
 “ passing or being upon such street or highway, or shall quit
 “ the highway, and go on the other side the hedge or fence
 “ inclosing the same; or wilfully be at such distance from
 “ such carriage, whilst it shall be passing upon such high-
 “ way, that he cannot have the direction and government of
 “ the horses or cattle drawing the same; or shall, by negli-
 “ gence or wilful misbehaviour, prevent, hinder, or interrupt
 “ the free passage of any other carriage, or of his majesty’s
 “ subjects, on the said highway; or if the driver of any empty
 “ or unladen waggon, cart, or other carriage, shall refuse or
 “ neglect to turn aside and make way for any coach, chaise,
 “ chaise, loaded waggon, cart, or other loaded carriage; or
 “ if any person shall drive, or act as the driver, of any such
 “ coach, post-chaise, or other carriage let for hire, or wag-
 “ gon, wain, or cart, not having the owner’s name as before
 “ required, painted thereon, or shall refuse to discover the
 “ true christian and surname of the owner of such respective
 “ carriages; being convicted by his own confession, the view of

“ a justice, or the oath of one witness, before any justice of the limit, shall forfeit not exceeding ten shillings, in case such driver shall not be the owner of such carriage; and in case the offender be owner, then not exceeding twenty shillings: and in either case, shall, in default of payment, be committed to the house of correction, not exceeding one month, unless the same shall be sooner paid; and every such driver may, with or without any warrant, be apprehended by any person who shall see such offence committed, and shall be immediately conveyed to a peace officer, in order to be conveyed before some justice; and if any such driver shall refuse to discover his name, the justice before whom he shall be taken, or to whom any such complaint shall be made, may commit him to the house of correction not exceeding three months, or proceed against him for the penalty aforesaid, by a description of his person and the offence, and expressing in such proceedings that he refused to discover his name.”

† *Stat.* 67. As to the eighth general Head of this Chapter, viz. In what manner those, who are charged with any offence relating to the highway, are to be proceeded against: It is enacted by the above-mentioned statute of 13 Geo. 3. c. 78. *The forms of proceedings.* par. 71. “ That the forms of proceedings in the schedule shall be used, upon all occasions, with such additions or variations only as may be necessary to adapt them to the particular exigencies of the case; and that no objection shall be made, or advantage taken, for want of form in any such proceedings.”

† *Stat.* 68. And it is further enacted, by par. 73. “ That the justices shall, at every special sessions to be held in the week next after the *Michaelmas* general quarter sessions, shall procure and deliver a printed abstract of the most material parts of this act to every surveyor to be then appointed, as the charge hereby directed to be given, who shall severally pay taxence for the same.” *Printed abstracts to be given to the surveyors.*

† *Stat.* 69. And it is further enacted by the same statute, par. 73. “ That all penalties and forfeitures, and all costs and charges, (the manner of levying and recovering of which is not hereby otherwise particularly directed), shall be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand and seal of some justice for the limit where such offence shall happen, or such order for payment of such costs or charges shall be made, rendering the overplus to the party after deducting the charges of making the same; which warrant such justice is hereby empowered to grant, upon conviction by “ commission,

Forfeitures, costs and charges may be levied by distress, &c.

In what manner
to be applied.

" confession, or the oath of one witness, or upon order made
" as aforesaid; and when so levied, shall be paid, the one
" half to the informer, and the other half to the surveyor
" where such offence shall happen; to be applied towards
" the repairs, unless otherwise directed by this act; but in
" case the surveyor shall be the informer, then the whole
" shall be employed towards the repair of such highway:—
" And in case such distress cannot be found, and such penal-
" ties or costs and charges, shall not be forthwith paid, such
" justice is hereby authorized, by warrant under his hand or
" seal, to commit such offender to the common gaol or
" house of correction of the limit where the offence shall be
" committed, or such order as aforesaid shall be made, for
" any time not exceeding three months, unless the said pe-
" nalty, costs, and charges, shall be sooner paid; and if such
" offender shall live out of the jurisdiction of the justice, any
" justice of the limit wherein such person shall inhabit, upon
" request to him for that purpose made, and upon a true
" copy of the conviction, and order for the payment of
" such costs and charges, produced and proved by a credi-
" ble witness upon oath, may, by warrant under his hand and
" seal, cause the penalty mentioned in such conviction, and
" the costs and charges mentioned in such order, or so much
" thereof as shall not have been paid, to be levied, by distress
" and sale of the goods and chattels of such offender; and if
" no sufficient distress can be had, commit such offender
" to the common gaol, or house of correction of such limit,
" for the time, and in manner aforesaid."

How to proceed
when the offend-
er lives within
another justice's
jurisdiction.

Warrant of dis-
tress, when to be
issued.

† Provided by par. 74. " That no warrant of distress, unless
" otherwise directed by this act, shall be issued for levying,
" any penalty, costs or charges, until six days after the of-
" fender shall have been convicted, and an order made and
" served upon him or her for payment thereof."

Conviction how
to be made.
Strange 132.
10 *Modest* 150.

† *Stat.* 70. And it is further enacted, par. 77. " That
" no conviction shall be made unless upon confession, or the
" oath of one witness, or the view of a justice in the cases
" before-mentioned; and that any inhabitant shall be deemed
" a competent witness."

(*See*) *Vide* Ke-
lyne 34.
Str. 600. 648.
B. R. M. 39.
See *Cal.* 179,
4. 6.
Stranger 1209.
Per. *K. B.* 111,
40.
1 *Black.* 467.

† *Stat.* 71. And it is farther enacted by the said statute,
13 Geo. 3. c. 78. s. 24. " That every justice of assize,
" justices of the counties palatine of Chester, Lancaster, and
" Durham, and of the great sessions in Wales, shall have
" authority by this statute, upon his or their own view, and
" every justice of the peace, either upon his own view, (21)
" or upon information upon oath to him given by any surveyor
" of the highways, to make presentment, at their respective
" assizes or great sessions, or in the open general quarter ses-
" sions,

" fions, of such respective limit, of any highway, causeway,
 " or bridge, not well and sufficiently repaired and amended, or
 " of any other default or offence committed and done contrary
 " to the provision and intent of this statute; and that all de-
 " fects in the repair thereof shall be presented in such jurisdic-
 " tion where the same do lie, and not elsewhere; and that
 " no such presentment, nor any indictment for any such de-
 " fault or offence, shall be removed by *certiorari*, or other-
 " wise, out of such jurisdiction, till such indictment or pre-
 " sentment be traversed, and judgment thereupon given, (22)
 " except where the duty or obligation of repairing the said
 " highways, causeways, or bridges, may come in question;
 " and that every such presentment made by any such justice of
 " assize, counties palatine, great sessions, or of the peace,
 " upon his own view, or upon such information having been
 " given to such justice of the peace, upon the oath of such
 " surveyor of the highways, as aforesaid, shall be as good,
 " and of the same force, strength, and effect, in the law, as
 " if the same had been presented and found by the oaths of
 " twelve men; and that for every such default or offence so
 " presented, as aforesaid, the justices of assize, counties pa-
 " latine, and great sessions, at their respective courts, and
 " the justices of the peace, at their general quarter sessions,
 " shall have authority to assess such fines as to them shall be
 " thought meet: saving to every person and persons that shall
 " be grieved by any such presentment, his, her, or their lawful
 " traverse to the same presentment (23), as well with respect
 " to the fact of non repair as to the duty or obligation of re-
 " pairing the said highways, as they might have had upon
 " any indictment of the same, presented and found by a grand
 " jury: and the justices of the peace, at their general quar-
 " ter sessions, or the major part of them, may, if they see
 " just cause, direct the prosecutions upon such presentments
 " as shall be made at the quarter sessions, as aforesaid, to be
 " carried on at the general expence of such limit, and to be
 " paid out of the general rates within the same.

Justices of assize
 and of the peace,
 &c. to present
 highways, &c.
 out of repairs

(22) It is now
 tried that the
 presentment
 shall be a main-
 ament to re-
 cover a general
 traverse to a
 presentment of a
 highway being
 out of repair,
 made by a jus-
 tice of the peace
 upon view.
 Barr. 15, 2.
 4 Modon 33.
 Strou. 275.
 1 Black. 408.

(23) This clause is copied from a similar clause in 22 Car. 2. c. 12. f. 4. and upon the authority of the King v. Harwell, 2 Strange 1200, which was an application for a writ of *certiorari* to remove an indictment upon the Highway Act, it was resolved Term 14 Geo. 3. that the *traverse* against it, upon 23 Geo. 2. c. 12. s. 24. before traverse of the indictment and judgment thereon, was to the King did not tax itself, and therefore the words "not taken to itself" be traversed, the words plainly shew that the King did not intend to take away the writ of *certiorari* at the instance of the King, although a private person is the real prosecutor, yet in these cases that circumstance makes no difference, as it was calculated merely to prevent delay on the part of defendants. Rex v. Inhabitants of Bodmin. Cowper 78.

Sec. 72. It hath been holden in the exposition of this clause, That the party against whom such a presentment shall be made, cannot take any traverse to the want of repair of such highway; but it is agreed, That he may plead that some other

Kellw. 24.
 Com. 131.
 Dalr. c. 26.
 1 Black. 467.

other person ought to repair the same, and traverse his own obligation to do it. Neither can I see upon what reason the former opinion is grounded, that he cannot traverse the want of repair of such highway; for since the statute expressly saves to every person who shall be touched by any such presentment, his lawful traverse to the same, as he might have to an indictment of trespass or forcible entry;" and since it seems clear, That every defendant to any such indictment may traverse the whole matter alledged against him, as hath been shewn more at large, Chap. 64. Sect. 58. why may he not as well have the same benefit in the present case? And though the record of a justice of peace acting by force of any statute, as a judge, be not traversable; yet it seems hard by such a general rule, to make any record not traversable, which by the express words of the statute, which authorises the making of it, is allowed to be traversable: it is true indeed, That a presentment in a court-leet is not traversable, unless it touch the party's freehold: but I do not see why such a presentment in pursuance of this statute should have the like privilege since the statute hath no mention of such presentments in courts leet, but gives the like traverse as is allowed by law upon any indictment of trespass, &c.

See Carth. 212,
275.
Sup. c. 64. s. 58.
5 Hen. 7.
Dyer. 15.

Affidavits may
be levied by a
justice.

† Sect. 73. And it is also enacted, 13 Geo. 3. c. 8. l. 1. par. 68. "That if any person shall refuse or neglect to pay any assessment within ten days after demand thereof made, the same shall be levied by any person authorised by warrant under the hand and seal of one justice, having jurisdiction therein, by distress and sale of the goods and chattels of the person so refusing or neglecting, rendering the overplus, the necessary charges of making such distress and sale being first deducted; and in default of such distress, any such justice may commit the person to the common gaol, until he shall have paid the sum so assessed, and the costs and charges occasioned by such neglect or refusal.

† And by par. 69. "That the surveyor shall be deemed, in all cases, a competent witness, notwithstanding his felony may arise in part from the forfeitures and penalties hereby inflicted."

By the provisions
of this act, any
person may be
compelled to
declare that the
defendant is indebted.

† Sect. 74. And it is also enacted by par. 75. "That every prosecutor or informer may, at his election, sue for, and recover any penalty of forty shillings or upwards, (the manner of recovery thereof not being particularly directed by this act), either in the manner herein-before directed, or by action at law, in any of his Majesty's courts of record, by action of debt, in which it shall be sufficient to declare that the defendant is indebted, as described in the

"act

“act; and the plaintiff, if he recovers, shall have double
“costs.”

† *Stat. 75.* Provided, par. 76. “That there shall not be
“more than one recovery for the same offence; and that ten
“days notice in writing be given to the party offending pre-
“vious to the commencement of such action; and that the
“same be brought and commenced within one calendar month
“after the offence for which such action is brought, shall
“have been committed.”

Limitation of
actions and no-
tices.

† *Stat. 76.* And it is further enacted, par. 79. “That
“where any distress is levied, the distress itself shall not be
“deemed unlawful, nor the party making the same a tres-
“passer, on account of any default or want of form in any
“proceedings relating thereto, nor shall the party distraining
“be deemed a trespasser *ab initio*, on account of any irregu-
“larity which shall be afterwards done by the party distrain-
“ing, but the person aggrieved by such irregularity, may
“recover full satisfaction for the special damage in an action
“on the case.”

Special damage
but distress not
unlawful for
want of form.

† *Stat. 77.* And it is further enacted, par. 65. “That
“the court before whom any indictment or presentment (24)
“shall be tried, may award costs to the prosecutor, to be
“paid by the person so indicted or presented, if it shall appear
“that the defence was frivolous; or to award costs to the
“person indicted or presented, to be paid by the prosecutor,
“if it shall appear that such prosecution was vexatious.”

(24) A person
indicted for not
repairing a highway
may sue for costs
if the defence is
frivolous, or for
costs if the
prosecution is
vexatious.
Rex v. White-
head, 2 Geo. 3.
1 B. & C. 221.

† And it is further enacted, par. 66. “That if the inha-
“bitants shall agree, at a vestry or publick meeting, to pro-
“secute any person by indictment, or to defend any indict-
“ment or presentment preferred against any parish, town-
“ship, or place, the surveyor may charge in his account the
“reasonable expences incurred in carrying on or defending
“such respective prosecutions, after the same shall have been
“agreed to by such inhabitants at a vestry or publick meet-
“ing, or allowed by a justice within the limit where such
“highway shall be, which expences shall be paid out of the
“fines, forfeitures, compositions, payments, and assessments.”

† And it is further enacted, par. 67. “That in all cases
“where a vestry or publick meeting of the inhabitants is dis-
“rected by this act, there shall be publick notice given of
“the day, hour, and place, of holding the said meeting, at
“the church or chapel of such parish, township, or place,
“on the Sunday next preceding such meeting, and also no-
“tice thereof in writing, specifying the purpose of such meet-
“ing, fixed at the same time upon the door of such church

" or chapel, and the same shall not be held till three days
 " at least after such notice given ; and if there be no church
 " or chapel, the like notice of such meeting shall be given
 " in writing, and put up at the most publick place therein,
 " three days at least before such meeting."

Forfeiture for
 opposing the
 execution of the
 act.

(25) *Vill. &*
Black. 603.

† And it is further enacted, par. 72. " That in case any
 " person shall resist or make forcible opposition against any
 " employed in the due execution of this act, or make any
 " rescue of the cattle or other goods distrained ; or if any
 " constable, headborough, or tithingman, shall refuse or neg-
 " lect to execute or obey any warrant or precept granted by
 " any justice, pursuant to the directions of this act ; being
 " convicted by a justice, shall forfeit not exceeding ten
 " pounds, nor less than forty shillings ; to be paid to the
 " surveyor (25) where the offence was committed, to be laid
 " out in the repair of the highways. and in case he do not
 " forthwith pay, or secure to be paid, the said forfeiture after
 " such conviction, such justice may commit such person to
 " the common gaol or house of correction of the limit, to
 " remain not exceeding three months, unless the said for-
 " feiture shall be sooner paid."

2 Strange 1209.
 2 Strange 644.
 See R. 1. C. 27.
 S. 37, 47.
 Cowper 78.

Stat. 78. It is enacted by the said statute of 13 Geo. 2.
 c. 78. s. 24. " That all defects of repairs of cautes, pave-
 " ments, highways or bridges, shall be presented in the county
 " only where such cautes, &c. lie, and not elsewhere ; and
 " that no such presentment, or indictment shall be removed
 " by *certiorari*, or otherwise, out of the said county, till such
 " indictment or presentment be traversed, and judgment there-
 " upon given."

Stat. 79. And it is further enacted by the said statute,
 section 81. " That all matters concerning highways, causers,
 " pavements, and bridges, mentioned in the said act, shall be
 " determined in the county where the same do lie, and not
 " elsewhere ; and that no presentment, indictment or order,
 " made by virtue of the said act, shall be removed by *certiorari*
 " out of the said county into any other court."

Queen v. Bramby
Mic. 10 Ann.
Strange 840.
100, 344, 359.
Bur. K. B.
177, 236, 443.
Cal. T. mp.
King & Co. 99.
5 Off. Cues
163, 379.

Stat. 80. Yet it hath been resolved, That if the quarter
 sessions, under pretence of the jurisdiction given them by
 these statutes, take upon them to do a thing manifestly ex-
 ceeding their authority, as to make an order on surveyors of
 the highways, to make up their accounts before a special ses-
 sions, their proceedings may be removed by *certiorari* into
 the King's Bench, and there quashed ; for the quarter-sessions
 have no manner of power given them to intermeddle origi-
 nally with such accounts, but only by way of appeal. (26)

(26) And if the prosecutor has enlarged the rule for showing cause why the order should not be
 quashed, he cannot afterwards object to the issuing of the *certiorari*. 2 Burr. 745.

Stat.

† *Stat.* 81. And it is further enacted, par 78. "That any justice may administer an oath to any person for the better discovery and execution of the several matters or things herein-before authorized or directed to be examined, enquired into, or performed by such justice."

† And it is further enacted, par. 62. "That any two justices are hereby impowered, to hold any special sessions, besides that which is herein-before directed, for executing the purposes of this act; and to adjourn the same from time to time, as they shall think fit, causing notice to be given of the time and place of holding such special sessions, and of the adjournments thereof, to the several justices acting and residing within such limits, by the high constable, or other proper officer within the same."

Justices may hold special sessions on notice.

† *Stat.* 82. As to the ninth general head of this chapter, viz. In what manner persons proceeded against for any of the above mentioned offences may defend themselves; it is enacted by the said statute, 13 Geo. 3. c. 78. par. 81. "That any person aggrieved by any person, in the execution of this act, and for which no particular method of relief hath been appointed, may appeal to the general quarter sessions, such appellant giving notice in writing of such appeal, and of the matter thereof, to the person against whom such complaint shall be made, within six days after the cause of such complaint arose, and within four days after such notice, entering into recognizance before some justice within such limit, with one surety, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the quarter session; and every person having received notice of such appeal, shall return all proceedings before them to the general quarter sessions, on pain of five pounds; and the said session, upon due proof of such notice, and recognizance, shall hear and finally determine such appeal in a summary way, and award costs to the parties appealing or appealed against, to be levied as before directed; and the determination of such quarter session shall be final and conclusive, and no proceedings shall be quashed or vacated for want of form, or removed by *certiorari*, or any other writ or process whatsoever, (except as herein-before mentioned), into any court of record at *Westminster*, provided that no such appeal shall be made against any conviction for any penalty, unless the person convicted shall, at the time of such conviction, if present, if not, within six days after, give notice of his intention to appeal, and at the same time enter into recognizance with sufficient sureties to pay such penalty, in case such conviction shall be affirmed; and upon his giving such security, the

Appeal may be made to the quarter sessions.

Proceedings not to be quashed for want of form, nor to be removed by *certiorari*.

" further proceeding for such penalty shall be suspended until such appeal shall be heard and determined."

Limitation of actions, and mode of pleading.

General issue.

Treble costs.

Plaintiff may tender of sufficient amends.

† And it is further enacted, by par. 82. " That every action or suit shall be commenced or prosecuted within three calendar months after the fact committed, and not afterwards ; and shall be brought within the county where the fact was committed, and the defendant may plead the general issue, and give this act, and the special matter, in evidence. And if brought after the time limited, or be laid in any other place than as aforementioned, the jury shall find for the defendant ; or if the plaintiff shall become nonsuit, or discontinue after the defendant shall have appeared, or if, upon demurrer, judgment shall be given against the plaintiff, the defendant shall recover treble costs."

‡ But it is also provided by par. 80. " That no plaintiff shall recover for any irregularity, trespass, or wrongful proceedings, if tender of sufficient amends shall be made before such action brought ; and in case no such tender shall have been made, the defendant by leave of the court at any time before issue joined, may pay into court such sum of money as he shall see fit. But nothing in this act contained shall extend to the city of *Bristol*, or to the parish of *Whitechapel*, and *Saint John, Wapping*, nor to abridge the powers of the commissioners of sewers, &c."

N. B. — This provision was inserted into the Statute of 1773, as amended.

Sec. 83. Also it seems to be implied in the construction of these (27) as well as of all other penal statutes, That no one ought to be convicted of any offence against them, without having notice of the accusation made against him, and an opportunity of defending himself. And therefore I shall take it for granted, that generally no one ought to be punished for any of the above mentioned offences, without being called upon to answer for himself, and having liberty to traverse the matters alledged against him ; it is true indeed, That it is generally holden, That no traverse can be taken against a presentment by a justice of peace of his own knowledge, as to the want of repair ; yet this opinion seems justly questionable for the reasons alledged in the seventy-second section of this chapter.

Sec. 84. However it is certain, That in all other cases, whoever is indicted or presented in any court, except a court-leet, for any offence relating to the highways, may traverse the whole matter alledged against him in such indictment or presentment. But it seemeth to be agreed, That he, who is preferred for such an offence in a court-leet, can only traverse it so far as it concerns his freehold, as by charging him with

with being bound to such repairs in respect of the tenure of his lands, &c. for which purpose it is certain that he may remove it by a *certiorari* into the King's Bench, and there traverse it. Also there is no doubt, but that after conviction, or upon a demurrer or confession, any one may take exceptions to any such indictment or presentment in any court for the want of legal form; but the court in discretion will very rarely suffer a man to take such exceptions before such conviction or confession, without a certificate and affidavit that the ways are in good repair.

5 H. 7. 4.
Dyer 14.
Fitch 386.

Anderſon 234.
1 Keble 256.
241. 329.
2 Keble 715.
728.

Sec. 85. Therefore, for the better understanding in what cases it may be safe to demur to, or contest an indictment or presentment of this kind, I shall lay down the following rules concerning them.

Sec. 86. First, That it is (a) safest in every such indictment to shew both the place from which, and also the place to which the way supposed to be out of repair doth lead, yet exceptions for want of such certainty have sometimes been disallowed; however it seems certain, that there is no necessity to shew (c) that a highway leads to a market town, because every highway leads from town to town.

(a) 2 R. Abr. 81.
Palm. r. 42.
(b) 2 Keble 715.
725.
(c) 3 Keble 89.
644.
Vile 4 Burr.
2611.
In R. 372.
where in objection of the kind.
412. 3 R. H. 316.

is disallowed. 1 Brownl. 9. (c) Palmer 389. 2 Roll. 412. 3 R. H. 316.

Sec. 87. Secondly, That it is necessary (d) in every such indictment expressly to shew in what place the nuisance complained of was done, for which (e) cause an indictment for stopping a way at D. leading from D. to C. is not good; for it is impossible that a way leading from D. should be in D. and no other place is alledged. (28)

(d) 2 Keble 621.
(e) 2 R. Abr. 81.
Comp. 111.

(28) So also in a presentment the highway must be alleged to lie in the parish, other of the parish is not bound to repair. Comp. 111. Sec. 181. But, in an indictment for a nuisance, it is not necessary to mention the parish of a highway. Sec. 44. Also if there be two villages, a parish, it is not necessary in an indictment for a nuisance to shew in which the nuisance lies. Dayr 119.

Sec. 88. Thirdly, That every such indictment ought also certainly to shew what part of the highway the nuisance did extend, as by shewing how many foot in length, and how many foot in breadth it contained, or otherwise the defendant will neither know of the certainty of the charge, against which he is to make his defence, neither will the court be able from the record to judge of the greatness of the offence, in order to assess a fine answerable thereunto; and upon this ground it hath been adjudged, That an indictment for stopping a certain part of the king's way at K. is naught, for the uncertainty thereof. Also it hath been resolved, that the place wherein such a nuisance is alledged, is not sufficiently ascertained in such an indictment.

C. Jac. 324.
Bach 183.

2 R. Abr. 81.

2 R. Abr. 81. dictment, by shewing that it contained so many foot in length, and so many in breadth, by estimation. (29)

(29) An indictment for a nuisance in laying soil in a highway is not bad for want of the length and breadth of the nuisance being set out. *Per* Lee C. J. Trin. 27. Geo. 2. Sayer 98. Nor for a nuisance in digging two grips or ditches in a common footway. Sayer 167. Nor for a nuisance that a certain highway and bridge are in a ruinous condition. Sayer 301.

Salkeld 359.
6 Modern 255.
Contra Sayer
168, 169.
(a) C. Eliz. 63.
(b) See 2 R. A.
83.
1 Ventris 208.
2 Keble 72.
(c) 1 Vent. 202.
3 Keble 23.

Sett. 89. Fourthly, That every such indictment must shew, That the way wherein a nuisance is alledged, is a way common to all the king's people; for which cause it hath been resolved, That an indictment for a nuisance to (a) horseway, without adding that it is a highway, is naught: and upon the same ground it seemeth also, That an indictment for a nuisance to a common footway to the church of D. for (b) all the parishioners of D. is not good; yet it (c) seems, That if those last words, *viz.* "For all parishioners of D." had been omitted, such an indictment might be maintained.

(d) Nov 93.
3 Keble 85.
The contrary
adjudged Pash.
5 Geo. 2. the
King v. Cor
rack. Vilevent.
331, according.
2 Keble 514.
Raymond 182. (e) 3 Keble 58. (30) If a man be charged to repair *ratione tenuræ*, he may throw it upon the parish by the general issue. Stra. 182. And it hath been held, upon consideration that *ratione tenuræ* is sufficient without *jura*. Strange 137.

Sett. 90. Fifthly, That it is not safe in an indictment against a common person for not repairing a highway, which he ought to have done in respect of the tenure of certain lands, barely to say that he was bound to repair it *ratione tenuræ terræ*, without adding (d) *jura*. (30) Also it is said, That in an indictment against a (e) bishop, &c. for not repairing a highway, in respect of certain lands, it ought to be shewn in what capacity he ought to repair it, because otherwise it cannot be known in what capacity the process is to be awarded against him.

11 Modern 56.
1 Anderson 234.
Fopham 266.

Sett. 91. Sixthly, That in every such indictment the fact alledged against the defendant must be expressed in such proper terms, that it may clearly appear to the court to have been a nuisance; and for this cause it hath been resolved, That a presentment for diverting a highway is not good, because a highway cannot be diverted, but must always continue in the same place where it was, howsoever it be obstructed, and a new way made in another place.

2 Roll. Abr. 79,
31.

Sett. 92. Seventhly, That an indictment against a man for stopping a highway in his own land is good, without laying the offence done *vi & armis*. Also it is said, That a presentment that a highway in such a place is decayed by the defaults of the inhabitants of such a town, is good without naming any person in certainty. But it hath been adjudged, That an indictment against particular persons must specially charge them every one; for which cause it hath been resolved, That an indictment against several for not repairing their streets, that they, & *eorum uterque*, did not repair them, is not good.

Sett. 93.

Sett. 93. Eighthly, That the defendants ought not to plead *quod non debent reparare*, without shewing who ought.

1 Sid. 140.
Carthew 213.
11 Modern 273.
12 Modern 13.
Salkeld 358.
6 Modern 163.

Sett. 94. That the defendants shall not be discharged by submitting to a fine, but a distringas shall go *in infinitum* till they repair.

APPENDIX THE FOURTEENTH. (a)

(a) Vide ante,
page 244.

OF TURNPIKE ROADS.

THE turnpike roads of England are placed under the management and direction of certain bodies of trustees, who are usually named and appointed by the respective acts of parliament, which are occasionally passed for the purpose of making, repairing, and sustaining the particular roads therein mentioned. But the powers of these statutes being confined to separate and distinct objects, it was thought expedient to pass some general laws which should apply in common to all trustees and turnpike roads in general, throughout the kingdom. These laws I shall endeavour to comprize under the following particulars:

Vide Sect. II. Digest of the highway and turnpike road acts *passim*.

1. As to trustees.
2. As to weighing engines; the weight allowed; and tolls.
3. As to carriages.
4. As to exemptions from toll.
5. As to statute duty and repairs.
6. As to materials for repairs.
7. As to nuisances.
8. As to subscribers and mortgagees.
9. As to officers in general.
10. As to repairing altered roads.
11. How far the powers of the highway act may be adopted.
12. As to the modes of proceeding.

† *Sett.* 1. First, As to trustees, it is recited, that many mischiefs have arisen from mean persons acting in that capacity, in the execution of those acts of parliament, as have incautiously omitted to direct that trustees shall be possessed of property to a certain value: it is therefore enacted by the general turnpike act, 13 Geo. 3. c. 84. (1) s. 44. "That no trustee shall be qualified for that office, unless he shall, in his

Trustees, how to be qualified.

(1) By 21 Geo. 3. c. 21. the act is extended to all acts of parliament which have been made since, and which shall

hereafter be made for the amending or repairing any particular turnpike roads in England.

" own or his wife's right, be in the actual possession or receipt
 " of the rents and profits of lands, tenements, or heredita-
 " ments of the clear yearly value of 40l. or possessed of or
 " intitled to a personal estate worth 800l. or shall be heir ap-
 " parent to a landed estate of 80l. a year; and unless (not
 " being such heir apparent) he shall take and subscribe the
 " oath in the act recited, before two or more of the trustees
 " appointed by such act; and if he shall presume to act as a
 " trustee, without being thus qualified, he shall forfeit 50l.
 " to any person who shall sue for the same, who shall re-
 " cover, without any other proof or evidence, that such per-
 " son hath acted as a trustee, except such person shall prove
 " that he is qualified in the manner above mentioned."

No person can
 be a trustee.

Sec. 2. And it is further enacted, par. 46. " That no
 " person who shall keep any victualling-house, ale-house, or
 " other house of publick entertainment, or who shall sell any
 " wine, cyder, beer, ale, spiritous, or other strong liquors
 " by retail, shall be capable of acting as a trustee, or of
 " holding any place of trust or profit under the trustees, or
 " of collecting the tolls. But no such person shall be pre-
 " cluded from farming such tolls, provided he employs a
 " person to collect them, who shall not be under such
 " incapacity."

What shall be
 evidence of a
 trustee.

And it is further enacted, par. 64. " That in all cases
 " where any action shall be brought against any trustee, evi-
 " dence of acting as such, together with the act of passin-
 " ment by which he or they were appointed, or the order, or
 " a copy of the order for the appointment or election, &c.
 " shall be sufficient proof his being trustee."

Their meetings
 regulated.

+ Sec. 3. And it is further enacted by the said statute, par.
 49. amended and explained by 18 Geo. 3. c. 63. " That
 " in all cases, where the trustees appointed by any act of par-
 " liament, shall not meet on the day appointed for their first
 " meeting by any such act; or on any day appointed by ad-
 " journment; or have not adjourned in the manner directed
 " by any such act; or when the day appointed for the first
 " meeting of the trustees has elapsed before the passing of any
 " such act; any five or more of the trustees appointed to ex-
 " ecute such act, shall and may, in any or either of the cases
 " aforesaid, cause notice under their hands to be affixed on
 " all the turnpike gates, which shall be then erected on the
 " roads for which they are trustees; or if no turnpike gate
 " shall be then erected; shall cause the like notice to be affixed
 " in some conspicuous place, in one of the market towns near
 " the roads directed to be repaired, and also shall publish in
 " some newspaper circulated in that part of the country, at
 " least

“ least *twenty days* before the intended meeting appointing the trustees to meet at the place where the last preceding meeting was appointed to be held; or at the place directed for the first meeting of such trustees, if no preceding meeting shall have been held, and the said trustees, when met in pursuance of such notice, shall and may carry such act or acts into execution, in the same and as full and ample a manner, as if no such neglect or omission had happened, or such act had been passed previous to the time appointed for the first meeting; and such trustees had met accordingly.”

† *Sec. 4.* But it is provided by 13 Geo. 3. c. 84. s. 50. That no meeting of such trustees shall be adjourned for any longer time than three calendar months, from the day on which such adjournment shall be made; and that no business shall be done at any meeting before ten in the forenoon; and no adjournment shall be made to any hour later than two in the afternoon, on which such meeting shall be appointed to be held; and that every act agreed upon at such meeting shall be signed, at the meeting, by a competent number of trustees, or otherwise such meeting, adjournment, and act respectively, shall be void.”

In what manner the meetings shall be adjourned.

† *Sec. 5.* And it is further enacted, par. 51. “ That if the trustees abuse or exceed their power, by erecting, or continuing any gate or turnpike, where they have not any power by virtue of any act, the justices of the limit where any such gate or turnpike shall be erected or continued, in their general quarter sessions assembled, upon complaint of such abuse or excess of power in such trustees, shall in a summary way hear and determine the same, and thereupon to order the sheriff of the county, who is hereby authorized and required to execute such order to remove the same.”

If they exceed their power in erecting gates, the justices may order the gates to be removed.

† *Sec. 6.* And it is further enacted, par. 84. “ That where any oath is required to be taken by this act, the justices of any limit, or the trustees of any turnpike road, as the case may be, according to their several jurisdictions, are empowered to administer the same.”

May administer oaths. Vide highway act, s. 1. Ante, p. 419.

† *Sec. 7.* And whereas there are no powers given to the trustees to let or farm out the tolls arising upon turnpike roads, and in many cases where the particular acts have given such power, they are not executed in the most beneficial manner for such roads; it is therefore enacted, par. 31. “ That any seven trustees, at a publick meeting, may let to farm the tolls of the several gates erected upon their respective turnpike roads, viz. The trustees shall cause notice to be given

Trustees may farm out the tolls.

Under particular directions and restrictions.

“ of the time and place for letting the same at least one month
 “ before the day appointed for that purpose, by fixing the
 “ same upon every toll-gate belonging to such turnpike road.
 “ and also upon the market cross of the market town nearest
 “ to the place where the said tolls are to be let, and also in
 “ some publick newspaper circulated in that part of the coun-
 “ try, and specifying in every such notice the sum which the
 “ said tolls produced in the preceding year, clear of the sa-
 “ lary for collecting the same; and that they will let such
 “ tolls by auction to the best bidder, on his producing suf-
 “ ficient sureties for payment of the money monthly, or
 “ quarterly, as the trustees shall require; and that they will
 “ be put up at the sum which they were let for or produced in
 “ the preceding year, clear of the salary of the collector.”

The method by
 which they shall
 turn out the
 toll.

† *Secl. 8.* And it is further enacted, “ That the trustees
 “ shall provide a glass, with so much sand in it, as will run
 “ from one end of it to the other in one minute; which glass,
 “ at the time of letting the said tolls, shall be set upon a table,
 “ and immediately after every bidding the glass shall be turned,
 “ and as soon as the sand is run out, it shall be turned again,
 “ and so for three times, unless some other bidding intervenes:
 “ and if no other person shall bid, until the sand shall have
 “ run through the glass for three times, the last bidder shall
 “ be the farmer or renter of the said tolls, and shall forthwith
 “ enter into a proper agreement for the taking thereof, and
 “ paying the money at the times specified in such notice, or
 “ as shall be agreed upon between him and the said trustees.
 “ And in case no bidder shall offer, the trustees may appoint
 “ a collector of such tolls, or fix some future day for the let-
 “ ting thereof, as they shall judge most proper, upon giving
 “ such notices as aforesaid, and shall and may in that case put
 “ them up at such sum as they shall think fit.”

Penalty for ta-
 king more or
 less toll.

† *Secl. 9.* And it is further enacted, “ That if the farmer or
 “ renter of such tolls shall take a greater or less toll, than is
 “ authorised and directed by this, or the particular turnpike
 “ act, he shall, for every offence, forfeit five pounds—and
 “ every other gate keeper shall forfeit 40 s.

Trustees may
 reduce the tolls
 if the publick
 are obliged.

Secl. 10. And it is further enacted, par. 29. “ That
 “ trustees, or any seven or more, at a meeting for the pur-
 “ pose, of which one calendar month notice shall be given in
 “ writing, to be affixed on the turnpike gates, or circulated
 “ in some newspaper, may lessen or reduce all or any of the
 “ tolls on the roads, for which they are trustees, for such time
 “ as they shall think fit, and afterwards, at a meeting as
 “ aforesaid, may, if they shall see occasion, advance all or
 “ any of the tolls so lessened, to any sum not exceeding the
 “ several rates granted by the acts. But if the whole money
 “ borrowed

“ borrowed on such tolls is not discharged, no such alterations shall be made, without the consent of four fifths of the creditors, for such sums as shall remain due on the respective tolls.”

† *Sec. 11.* And it is further enacted, par. 47. “ That the trustees or any five or more, at a publick meeting, may direct prosecutions by indictment against any offender for any nuisance done, committed, or continued in or upon any turnpike road under their care respectively, at the expence of the revenues belonging to such roads, to be allowed by the trustees, or any five or more at some subsequent meeting; provided such offender shall confess, or the trustees can support the prosecution by one witness who shall prove the fact.” May direct prosecution for nuisances.

† *Sec. 12.* And it is further enacted, par. 54. “ That any two or more trustees, upon the death of any toll-gatherer or gate-keeper, may nominate and appoint another, until the next meeting of the trustees, who shall possess all the powers and privileges of his predecessor.” May appoint a toll-keeper.

† *Sec. 13.* And it is further enacted, par. 62. “ That the trustees may agree with any person liable by tenure, inclosure, or otherwise, to repair certain highways, which have become turnpike roads, for the repair thereof, in such manner as they shall think fit; and may contribute so much, on their parts, to the repair thereof, out of the tolls arising from such turnpike road: or out of the statute duty belonging to the same, as they shall think just and reasonable.” May agree with persons liable to repair highways.

† *Sec. 14.* And it is further enacted, par. 66. “ That the trustees of every turnpike road in *England*, shall put up and afterwards continue upon every toll-gate, within their respective districts, a table of all the tolls payable at every such gate, distinguishing each toll and the different sorts of carriages for which they are to be paid; and also a table of the weights allowed for each carriage, with the loading thereof, in summer and winter. And the said trustees shall from time to time exercise and inspect every weighing engine on their respective roads, to see that the same, with their weight, are in such good order as to weigh the carriages and loading with accuracy.” Shall hang up tables at toll-gates, &c.

† *Sec. 15.* It is also enacted, par. 41. “ That the trustees shall order the surveyor to erect mile stones or posts (2) Shall erect mile stones, direction posts, &c.
(2) The trustees are also ordered to erect direction posts with proper inscriptions thereon, where cross roads meet, or where there are deep or dangerous floods, in the same manner and words as surveyors of highways, are to do by 13 Geo. 3. c. 78. s. 26. recited page 396.

“ upon

Vide ante,
p. 397.

“ upon the turnpike roads under their care, with proper inscriptions and figures thereon, denoting the names and distances of the principal towns and places on each respective road, and from time to time shall repair such stones and posts, and keep and continue legible the inscriptions thereon respectively.”

May erect
weighing
engines.

(3) But it hath been adjudged that toll gates should not be erected in the middle of great towns, so as to obstruct the necessary intercourse.
1 Burr. 377.

SECT. 16. Secondly as to weighing engines; the weight allowed, and additional toll. It is further enacted by the said statute, par. 1. “ That all trustees appointed by any act of parliament for any turnpike road in England, or any five or more of them, at some publick meeting, if they shall think proper, at as many turnpike gates as they shall erect (3) for the receiving toll; or upon any part of the road within their respective jurisdictions, and at such a distance as they shall think expedient, shall and may cause to be erected a crane, machine, or engine, proper for weighing of carts, waggons, or carriages, conveying of any goods or merchandize whatever; and by writing signed by them, or any five or more of them, shall and may order every such carriage which shall pass loaded through every such gate or bar, to be weighed with the loading thereof.”

But it is provided by sect. 34. “ That no toll gate shall be erected on the side of any turnpike road, unless ordered by the trustees, at a meeting, of which 21 days publick notice shall have been given in writing affixed upon all the toll gates, erected on such roads, and also in some publick news-paper circulated in that part of the country, specifying the place where such side gate is proposed to be erected, and unless nine trustees at least (being a majority of those present) shall sign the said order at such meeting; and that no person shall be liable to pay toll at any toll gate erected, or to be erected, across or on the side of any turnpike road, or be subject to any penalty for any carriage, horse or beast, which shall only cross such road, and shall not pass above 100 yards thereon, except over some bridge erected at a considerable expence by the trustees of such turnpike road.”

The burden
with which car-
riages are
loaded to pass.

+ SECT. 17. And it is further enacted, by par. 1. “ That the trustees shall take, over and above the tolls, a certain sum for every 112 lb. which every such waggon or cart, together with the loading shall weigh over and above the following weights: To every four-wheel carriage, having fclies of 16 inches, 8 tons in summer, and 7 in winter.—To every waggon or wain, having the axletrees thereof of such different lengths that the distance from wheel to wheel of the nearer pair of the said wheels be not more than 4 feet 2 inches, to be measured at the ground, and that the distance from wheel to wheel of the other pair thereof

“ thereof be such, that the fore and hind wheels of such wag-
 “ gons and wains shall roll only one single surface or path of
 “ 16 inches wide at the least, on each side of the said waggons
 “ or wains, and having the fellies thereof of the breadth of 9
 “ inches from side to side at the bottom or sole thereof, 6 tons
 “ 10 hundred in summer, and 6 tons in winter.—To every wag-
 “ gon or four-wheeled carriage, having the sole or bottom of
 “ the fellies of the wheels of the breadth of 9 inches, 6 tons in
 “ summer, and 5 tons 10 hundred in winter.—To every cart,
 “ having the fellies of the same dimensions, 3 tons in summer,
 “ and 2 tons 15 hundred in winter.—To every waggon, having
 “ the sole or bottom of the fellies of the wheels of the breadth
 “ of 6 inches, 4 tons 5 hundred in summer, and 3 tons 15 hun-
 “ dred in winter.—And to every such waggon so constructed
 “ as to roll and actually rolling a surface of 11 inches, by the
 “ wheels thereof, 5 tons 10 hundred in summer, and 5 tons in
 “ winter.—To every cart, having fellies of the wheels of the
 “ same dimensions, 2 tons 12 hundred in summer, and 2 tons
 “ 7 hundred in winter.—To every waggon, having the sole or
 “ bottom of the fellies of the wheels of less breadth than 6 inches,
 “ 3 tons 10 hundred in summer, and 3 tons in winter.—And
 “ to every cart, having the fellies of the wheels of the same di-
 “ mensions, 1 ton 10 hundred in summer, and 1 ton 7 hun-
 “ dred in winter.—And for the several purposes aforesaid, it shall
 “ be deemed summer from the 1 May to 31 October both inclu-
 “ sive, and winter from 1 Nov. to 30 April, both inclusive.”

† *Stat.* 18. And by 14 Geo. 3. c. 82. “ All trustees or any
 “ five or more of them are empowered to take and receive
 “ over and above the tolls already granted, the following sums
 “ of money: For every 112 lb. which any waggon, cart, or
 “ carriage, together with the loading, shall weigh at any
 “ weighing engine, over and above the weights allowed as
 “ above, $\frac{1}{2}d.$ —For the 1st, and 2 cwt. 3 *d.* each.—For every
 “ 4 cwt. such over weight above 2 cwt. and not exceeding 5 cwt.
 “ 6 *d.*—For every cwt. of such over weight above 5 cwt. and
 “ not exceeding 10 cwt. 2 *s.* 6 *d.*; for every cwt. of such
 “ over weight above 10 cwt. and not exceeding 15 cwt. 5 *s.*—
 “ For every cwt. of such over weight above 15 cwt. 20 *s.*
 “ The money arising from such additional tolls to be applied
 “ to the roads where they are collected. But the trustees
 “ within 10 miles of *London*, *Westminster*, and *Southwark*, are
 “ empowered at their general or quarterly meetings to lower
 “ the additional tolls hereby directed to be taken as aforesaid,
 “ as to them shall seem fit.”

The additional
 tolls are paid at
 the toll-gate.

† *Stat.* 19. And it is further enacted by 13 Geo. 3. c. 84.
 f. 9. That any trustee, creditor, clerk, treasurer, or surveyor,
 on suspicion of fraud, may cause any carriage liable to be
 weighed which shall have passed through any toll-gate where

Trustees, &c.
 may personally
 cause carriages
 to return to
 the weighing
 engine.
 such

“ such weighing engine shall be erected, and shall not have
 “ passed above 300 yards beyond such toll-gate, to return to
 “ such weighing engine, and be then weighed with the load-
 “ ing which passed through such gate in the presence of the
 “ said trustees, creditor, clerk, treasurer, or surveyor, upon
 “ requiring the driver thereof to drive back to such weighing
 “ engine, and upon tendering him 1s. for so doing, which
 “ shall be returned to the person paying the same, if the weight
 “ shall be found excessive.”

† *Sec. 20.* And it is further enacted by 13 Geo. 3. c. 84. f. 2. “ That every toll-gate keeper, where such engine shall be
 “ erected, shall weigh all such carriages as he shall suspect to
 “ be laden with greater weights, and receive the additional
 “ tolls, upon pain of forfeiting 5/.”

Trustees shall
make p^r
the carrying
to turn.

And it is further enacted by par. 4. “ That the trustees
 “ shall cause the surveyors to make convenient places for
 “ turning such carriages where such weighing engine shall be
 “ erected, within 300 yards of such toll-gate, on each side
 “ thereof, if the ground will admit of the same. And a list
 “ of the names of all the trustees, creditors, the clerk, trea-
 “ surer, and surveyor, shall be put up in the house where
 “ such weighing engine shall be placed, to be inspected by
 “ the owner or driver of every such carriage: and if the
 “ driver refuse to return, he shall forfeit 40s. and any peace
 “ officer or other person being present upon such refusal,
 “ may drive such carriage back, in order to be weighed as
 “ aforesaid.”

The names of
the trustees, &c.
shall be affixed
in the house.

Driver refusing
to return
40 s. &c.

Carriages ex-
empted from be-
ing weighed.

† *Sec. 21.* But it is enacted by 14 Geo. 3. c. 82. “ That
 “ no waggon, cart, or carriage employed in husbandry, or
 “ carrying only manure or lime for the improvement of land;
 “ as hay, straw, fodder, or corn unthreshed, (excepting hay
 “ or straw carried for sale), shall be weighed at any weighing
 “ engine.”

Justices upon
complaint made
may order
weighing en-
gines to be er-
ected where they
think proper.

† *Sec. 22.* And it is provided by 13 Geo. 3. c. 84. f. 7.
 “ That the justices at general quarter sessions, upon complaint
 “ by any justice or two creditors, or two trustees, that such
 “ turnpike road is much damaged by excessive weights, and
 “ that no engine hath been erected upon the same, may sum-
 “ mon the clerk, surveyor, and treasurer of such turnpike
 “ road, to their next general quarter sessions, to shew cause
 “ why the same should not be erected at or near such gates,
 “ upon such turnpike roads as shall be described in such sum-
 “ mons; and if at such subsequent sessions the said clerk,
 “ surveyor, and treasurer, some or one of them, shall not
 “ appear, or appearing, shall not shew sufficient cause against
 “ the erecting thereof, the said justices, at such quarter ses-
 “ sions,

“ fions, may order one or more weighing engine at such
 “ place; a copy of which order shall be forthwith delivered to
 “ the clerk of such road; and the trustees, at their next meet-
 “ ing, after their clerk shall have been served with such
 “ copy of the order, may contract with proper persons for
 “ the making and erecting the same; and the treasurer shall
 “ pay the expences thereof, out of the money which shall
 “ then be, or next come into his hands from the tolls arising
 “ upon such turnpike road.”

† *Secl.* 23. It is also provided by said statute, par. 8. “ That
 “ when turnpike roads meet at or near the same place, the
 “ trustees respectively shall fix upon some convenient place
 “ to erect a weighing engine upon, which will accommodate
 “ all such roads, and proportion the expences thereof, and
 “ forfeitures at such engine, amongst all such turnpike
 “ roads.”

Where two or
 more roads
 meet, trustees
 may erect one
 weighing engine
 to accommodate
 them.

† *Secl.* 24. And it is further enacted, par. 9. “ That the
 “ trustees or their lessee shall not make composition for tolls,
 “ in respect of any carriage, or horses, or beasts of draught,
 “ drawing the same, unless they have the fellies of the wheels
 “ of the breadth of six inches, or more.”

Trustees not to
 make composi-
 tion for tolls,
 unless waggons,
 &c. have the
 fellies of wheels
 of six inches
 broad.

† *Secl.* 25. And it is further enacted, par. 10. “ That if
 “ any person shall unload goods from any carriage, (except
 “ such carriages as are before excepted), before the same shall
 “ come to any turnpike gate or weighing engine, or shall
 “ load upon such carriage, (except as aforesaid), after the same
 “ shall have passed any such turnpike or weighing engine, any
 “ goods, taken from any horse, or other carriage, belonging
 “ to, or hired, or borrowed by the same waggoner or carrier,
 “ in order to avoid the payment of the additional duties, as
 “ aforesaid; and if any person shall so unload, in order to
 “ carry considerable quantities of goods through any turnpike
 “ gate, in one and the same day, and thereby pay less toll at
 “ such turnpike gate than would have been paid if such goods
 “ had not been to unloaden, on conviction before one justice,
 “ upon the oath of one witness, he shall forfeit five pounds.
 “ And each and every driver, not being the owner, who
 “ shall so offend, on conviction, as aforesaid, shall be com-
 “ mitted to the house of correction for one month.”

§ 7. penalty on
 unloading goods
 before coming
 to any gate or
 weighing en-
 gine.

† *Secl.* 26. And it is further enacted by par. 11. “ That
 “ if the owner of any carriage, or the driver travelling on
 “ any turnpike road, where any toll gate or weighing engine
 “ is erected, shall drive or turn out of the same into any other
 “ road, in order to avoid being weighed, or paying toll, and
 “ shall

Penalty for
 avoidin
 weighin en-
 gine.

" shall afterwards proceed with such carriage into, and on the same turnpike road, every such owner or driver, convicted as aforesaid, shall forfeit, if he be the owner, any sum not exceeding 5*l.* nor less than 20*s.*; and if he be the driver, and not the owner, not exceeding 50*s.* nor less than 10*s.* for every such offence."

(4) N. B. By sect. 67. of this act, two oxen or neat cattle are to be considered as equal to one horse, in the same manner as by the highway act. Sect. 59. Vide ante, p. 411.
(5) By sect. 63. carriages to have names and descriptions on them, in the same manner as directed by the highway act. Sect. 60. Ante, p. 412.
Vile Burnrow 2258.

† Sect. 27. Thirdly, As to carriages, It is enacted, by 13 Geo. 3. c. 84. s. 13. " That no four wheeled carriage, having the bottom of the fellies nine inches broad, shall be drawn on any turnpike road with more than eight horses. (4) Nor any two wheeled carriage, having wheels of the breadth aforesaid, with more than 5 horses. And the horses shall draw in pairs, (except an odd horse in any team, and except where the number of horses shall not exceed 4). And also, that no four wheeled carriage, (5) having the bottom of the fellies, of the breadth of 6 inches, shall be drawn in any turnpike road with more than 6 horses; and that no two wheeled carriage, having wheels of the breadth last mentioned, shall be drawn with more than 4 horses; and no four wheeled carriage, having fellies less than 6 inches, with more than 4 horses; and no two wheeled carriage, having fellies less than 6 inches, with more than three horses; and the owner shall forfeit 5*l.* and the driver, not being the owner, 20*s.* for every offence, to any person who shall sue for the same."

Rollers with flat surfaces may be drawn with any number of horses.
And by 22 Geo. 3. c. 21. s. 5. all such carriages shall only pay half the tolls directed by this act.

† Sect. 28. Provided, by par. 14. " That all carriages moving upon rollers of 16 inches on each side thereof, with flat surfaces, may be drawn with any number of horses, or other cattle."

Prosecution not to be commenced, unless information be laid within three days after the offence committed.

† Sect. 29. Provided always, by par. 15. " That no prosecution shall be commenced before a justice by information, for any forfeiture incurred by the owner or driver having a greater number of horses, unless such information be laid within three days after the offence committed; and no action, unless commenced within one calendar month; and neither such information or action, unless notice be given by the informer to the driver on the day the offence shall be committed, of an intention to complain of such offence; and if the offender lives so remote as to make it inconvenient to summon him, the justice may dismiss the complaint, and leave the informer to his remedy by action at law."

Penalty for taking off horses, &c.

† Sect. 30. And it is further enacted, par. 17. " That if any person shall take off any horse, or other beast of draught, from any carriage, or shall alter the distance of the wheels

“ wheels before the same shall come to any of the turnpikes,
 “ with intent to avoid any toll forfeiture or penalty for draw-
 “ ing with a greater number of horses, or beasts of draught,
 “ than is hereby allowed on conviction before one justice,
 “ upon the oath of one witness, shall forfeit 5*l*.”

† *Stat.* 31. And it is further enacted, par. 18. “ That if
 “ it shall appear to the trustees, or any seven of them, at any of
 “ their publick meetings, by the oath of one witness, experi-
 “ enced in levelling, that any part of the rise of any hill shall
 “ be more than 4 inches in a yard, they may allow such
 “ number of horses as they shall judge necessary, not exceed-
 “ ing 10, for waggons with 9 inch wheels, nor 6, for carts
 “ with 9 inch wheels, and not exceeding 7, for waggons
 “ with 6 inch wheels, nor 5, for carts with 6 inch wheels;
 “ and not exceeding 5, for waggons with wheels of less
 “ breadth than 6 inches, nor 4, for carts with wheels of less
 “ breadth than 6 inches. And in case it shall appear to the said
 “ trustees, in manner aforesaid, that the whole rise of any hill
 “ taken together shall be more than 4 inches in a yard upon
 “ an average, the said trustees, or any seven of them, may
 “ allow such number of horses as they shall think fit to be used
 “ in such waggons and carts respectively, for the purpose only
 “ of drawing the same up such hill or hills, as aforesaid, the
 “ length and extent of such hill or hills to be specified in such
 “ order of allowance, and the termination at each end thereof
 “ to be marked by a post or stone, to be erected at such respec-
 “ tive boundaries; and the said order of allowance shall be
 “ certified by the said trustees, or their clerk, to the next ge-
 “ neral quarter sessions, of the limit within which such hill or
 “ hills shall respectively be situated: and if the facts shall be
 “ proved upon the oath of one witness to the satisfaction of
 “ the bench, the said order shall be confirmed and filed, or
 “ otherwise vacated and quashed: and from and after such
 “ confirmation and filing, no person shall be liable to any pe-
 “ nalty or forfeiture for using such number of horses as shall
 “ be so allowed in drawing any waggon or cart up such hill
 “ or hills respectively; and the said justices, at any subsequent
 “ quarter sessions of the peace, may reconsider the said order
 “ of allowance, and to discharge the same, if they think
 “ fit.”

† *Stat.* 32. And it is further enacted, par. 20. “ That no
 “ carriage, having the bottom of the fellies of less breadth than
 “ 9 inches, shall pass upon any turnpike road drawn by horses
 “ in pairs, other than, and except such carriages, having the
 “ fellies of 6 inches, as shall be authorised to be drawn in
 “ any other manner by the order of trustees, within their di-
 “ strict, made at a publick meeting, consisting of seven trustees

“ or more, which order the said trustees may revoke at any subsequent meeting, and afterwards make a new one fixed in writing upon every toll gate within such district, and except carriages drawn by two horses only.”

† *Stat.* 33. And it is also enacted, par. 59. “ That the justices of the peace for Wales, at their general quarter sessions, to be held in the week after Michaelmas, may license an increase of the number of horses to be employed in drawing carriages on turnpike roads within their respective jurisdictions, over and above the number herein before limited, if the state of the roads make such an increase necessary, which order they may revoke, alter or vary at any subsequent Michaelmas session.”

For the manner in which they are to be marked vide ante, p. 412.

† *Stat.* 34. And it is further enacted, par. 21. “ That in case any person shall drive any carriage not being marked according to the directions of this act, or drawn by more than the number of horses, or beasts of draught, hereby respectively authenticated, any constable, tythingman, surveyor, or other person, may apprehend and take such person before a justice where the offence shall be; and, on conviction by confession, or the oath of one witness, shall forfeit not exceeding 5*l.* nor less than 1*0*s**.”

† *Stat.* 35. And it is further enacted, par. 2. “ That the trustees appointed by any act of parliament for repairing particular roads, or any five or more, within their respective districts, at the first meeting after this act, do multiply, lessen, and reduce the high and extraordinary tolls imposed by such certain particular acts, to an equality with the tolls and duties imposed by this act respectively.”

Where the wheels move on rollers, or the breadth of the wheels on each side, with the surface, to pass without toll for one year, and then after paying one half of the toll.

† *C.* 2. 36. Fourthly. As to exemptions from tolls: “ It is enacted, by 13 Geo. 2. c. 84. s. 26. and by 14 Geo. 3. c. 82. s. 5. That all carriages, moving upon rollers, of the breadth of 16 inches on each side, with flat surfaces, shall pass on any turnpike road, through any toll gate or bar, toll free, upon paying only so much of the tolls and duties as shall not exceed one-half of the full toll or duty payable by this or any turnpike act, for all waggon, wains, or carts, having the felly of the wheels of the breadth or gauge of 6 inches from side to side, or for the horses or beasts of draught drawing the same, and not rolling a surface of 16 inches on each side; and that no more than half toll shall be paid in respect of waggon having the felly of the wheels thereof of the breadth of 9 inches, and rolling a surface of 16 inches on each side.”

† *Stat.*

† *Secl.* 37. Provided also, by 13 Geo. 3. c. 84. par. 27. "That nothing therein contained shall extend to any carriage marine, coach, landau, berlin, chariot, chaise, chair, calash, or hearse, or to the carriage of such ammunition or artillery as shall be for his majesty's service, or to any cart or carriage drawn by one horse, or two oxen, and no more; or to any carriage, having the sole or bottom of the fellyes of the wheels thereof of the breadth of 9 inches, which shall be laden with one block of stone, one piece of marble, one cable rope, one piece of metal, or one piece of timber."

Carriages to which the act does not extend.

Vol. 4 Burrows 226.

† *Secl.* 38. Provided also, by par. 28. "That if any person shall take the benefit of any exemptions, under any act for the repair of any turnpike road, in any fraudulent or collusive manner whatsoever, he shall forfeit not exceeding 5*l.* nor less than 4*s.* for every such offence."

Penalty on persons not entitled to take the benefit of any exemption, is not to exceed 5*l.*

† *Secl.* 39. And it is enacted by 18 Geo. 3. c. 63. "That no toll shall be taken for any horses belonging to officers or soldiers upon their march, or upon duty, or for any horses, cattle, or carriages employed in carrying their arms or baggage, or any sick, wounded, or disabled officers or soldiers; and no carriages so employed shall be weighed, or the owner or driver liable to any forfeiture for carrying greater weight than allowed by law."

Reg. 4 waggons exempted.

† *Secl.* 40. And it is further enacted by said statute 13 Geo. 3. c. 84. f. 24. "That no person shall take exemption from toll, in respect of any carriage, or horse drawing the same, and carrying any particular kind of goods, unless such carriages have the sole of the bottom of the fellyes of the breadth of 6 inches, or upwards, (other than and except carts and carriages employed in carrying corn, or grain in the straw, hay, straw, fodder, dung, lime for the improvement of land, or other manure, or any implements of husbandry only); but that the usual toll, together with the additional tolls hereby required to be taken for carriages having the bottom of the fellyes of less breadth than 6 inches, as aforesaid, and for and in respect of horses or beasts of draught, drawing the same, (except as before excepted), shall be paid as if no exemption, or less toll, had been allowed, and as fully as all other carriages, and horses drawing the same."

No exemption in respect of any carriage or horse to be claimed by any person, unless the sole of the bottom of the fellyes of the breadth of 6 inches, or upwards.

Carts, &c. employed in husbandry excepted.

† *Secl.* 41. Provided, par. 25. "That no person be allowed to take the benefit or any such exemptions, or to have the privilege herein-before given of compounding in respect of any carriage having the fellyes of the wheels thereof of the breadth of 6 inches, or upwards, unless the fellyes and the tire of such fellyes shall lie flat.—And by 16

Notice to be given of exemption in respect of the fellyes of the wheels.

“Geo. 3. c. 39. f. 2. the fellies or tire whereof shall not deviate more than one inch from a flat surface shall be taken to be flat, according to the intent and meaning of this act.”

† *Seet.* 42. And it is further enacted by 13 Geo. 3. c. 84. f. 60. “That no toll shall be collected for carriages solely employed in carrying materials for the repair of any turnpike road or public highway, or for going to or returning from such employment.”

The mail coach, exempted from toll.

† *Seet.* 43. And it is further enacted by 25 Geo. 3. c. 57. “That all carriages of what description soever, or horses which shall be employed in conveying from one part of this kingdom to another, the mail or packet which shall be made up under the authority and direction of the post-master general, or his deputies, shall be exempted, freed, and discharged from the payment of any tolls whatsoever, that shall or may be demanded for the passage of carriages or horses through any turnpike, toll-gate, or bar, at which any toll is collected by any act or acts of parliament now in force; and all turnpike keepers or toll collectors are hereby directed and required to permit such carriages and horses to pass through all and every turnpike, toll-gate, or bar, without demanding any toll or duty for so doing.”

All Statute duty to be performed in the parish, &c. where it arises.

† *Seet.* 44. Fifthly. As to statute duty, it is enacted by 13 Geo. 3. c. 84. f. 32. “That surveyors shall cause the statute-duty required by the respective turnpike acts, and the compositions arising from the same, to be performed, laid out, and expended, upon the turnpike road lying within the parish, township, or place, from which such duty shall be required, and not elsewhere, and shall remit 40 s. for every misapplication thereof; and that where there are two or more turnpike roads under several acts of parliament within the same parish, township, or place, and the statute-duty shall exceed three days duty in the whole; two justices shall at some special sessions, adjust the statute-duty betwixt such turnpike roads and the other highways in such parish, township, or place, the said justices previously summoning the clerks and surveyors of such turnpike roads, and likewise the surveyors of the highways, who are hereby respectively required to attend such summons.”

If the statute-duty exceeds three days duty in the whole, the justices shall adjust the statute-duty between such turnpike roads and the other highways in such parish, township, or place, the said justices previously summoning the clerks and surveyors of such turnpike roads, and likewise the surveyors of the highways, who are hereby respectively required to attend such summons.

† *Seet.* 45. Sixthly. As to materials for repairs, it is enacted by par. 61. “That no surveyor shall gather any stones for the use of the highways, upon or from the common fields or inclosed lands or grounds of any person, without the consent of the occupiers of such lands or grounds, or a licence from a justice of the limit where such lands or grounds lie
“for

“ for that purpose after having summoned such occupier to
 “ come before him and heard his reasons, if he shall appear
 “ and give any for refusing his consent.”

† *Stat.* 46. And it is provided par. 65. “ That satis-
 “ faction shall be made by the trustees of turnpike roads for
 “ all such materials as are got in feyeral or inclosed lands (6)
 “ or grounds in the same manner as satisfaction is to be made
 “ respecting materials for the highways by virtue of 13 Geo.
 “ 3. c. 78. s. 29.”

(6) Vide the
 case of *Rex v.*
Manning. 1
Barr. 377 to
 383.
 Vide the clause
 at length. *Ante*
 p. 398 l. 41.

† *Stat.* 47. And by par. 36. “ The surveyor of turnpike
 “ roads with the approbation of the trustees, may, under the
 “ like circumstances contract for the getting and carrying ma-
 “ terials and shall be liable to the same penalties for having any
 “ share in such contract, as the surveyor of highways may do
 “ by 13 Geo. 3. c. 78. s. 50, recited at large in the preceding
 “ chapter, page 403, section 45.

† *Stat.* 48. Seventhly. As to nuisances it is enacted by par.
 37. “ That if the surveyor or other person having the care of
 “ any turnpike road, shall knowingly suffer to be or remain,
 “ for four days in any part thereof, within ten feet on
 “ either side of the middle of such road any post, heaps
 “ of stones, rubbish or earth, set up or raised on or above the
 “ surface of the said road, by which the passage thereof shall or
 “ may be obstructed, impeded, confined or straitened, (other
 “ than and except posts, blocks, stones, or banks of earth fix-
 “ ed in the ground, or piled for securing horse or foot roads or
 “ passages for water, and all direction posts and stones) such
 “ surveyor or other person shall forfeit 40s.”

Trustees may
 dir. it prosecu-
 tion for nu-
 tance..

N. B. For
 penalties by
 persons making
 encroachments
 within 50 feet
 of the centre of

the road, or ploughing within 15 feet thereof, by which they incur the penalty of 40s. The same
 clause is enacted by the 38th section of this act as is enacted by the 64th section of the highway
 act for which vide *Ante* p. 409, section 63.

† *Stat.* 49. Eightly. As to subscribers and mortgagees, it
 is enacted by par. 35. “ That if any person shall agree to ad-
 “ vance any sum of money, to be employed in the making
 “ or repairing any turnpike road, or highway intended to be
 “ made turnpike, and shall subscribe his, her, or their name
 “ or names to any writing for that purpose; every such
 “ person shall be liable to pay every sum or sums of money
 “ so subscribed, according to the purport of such writing;
 “ and in default of payment thereof within twenty-one
 “ days after the same shall become payable, according to
 “ the purport of such writing; and shall be demanded by
 “ the person to whom the same is made payable by such
 “ writing; or if no person be named therein for that
 “ purpose by the treasurer, every such treasurer or other
 “ person

Subscriber, and
 mortgagee..

"person may sue for and recover the same in any of his majesty's courts of record by action of debt, &c."

Mortgagees shall account for the monies they receive for tolls.

† *Stat.* 50. And it is further enacted by the said stat. par. 52. "That every mortgagee that hath taken or been in possession of any toll, gate, or bar set up or erected on any turnpike road, or of any lands or tenements, the rents and profits whereof are appropriated to the repair of any such turnpike road shall within 14 days after he, she or it shall have received notice in writing from the trustees of such turnpike road or any 5 of them, tender upon oath to be administered and taken by and before one justice or any one tithingman exact account in writing, to such trustees, or to any person appointed by them or any 5 of them to be returned in such notice, of all monies received by such mortgagee or by any other person for their use and benefit or by their authority, at such toll, gate or bar or otherwise, and of what they have expended in keeping or repairing the same; and in case they shall neglect to render such account when required, in the manner herein directed, they shall severally forfeit and pay to the said trustees, 10*l.* to be recovered by the said trustees, or any 5 or more of them, or by the treasurer or clerk to the said trustees in a summary manner before one justice to be applied to the use of the respective road whereupon such toll, gate or bar shall be placed."

For every
such offence

† *Stat.* 51. And it is further enacted by par. 53. "That if any such mortgagee, shall keep possession of any toll, gate or bar, or receive the tolls and duty thereof or of any such rents or profits as aforesaid after such mortgagee shall have received the full sum of money due on his mortgage and the interest thereof with costs, such mortgagee shall forfeit to the trustees double the sum of money he shall have received over and above the sum due as aforesaid, with treble costs of suit; to be recovered by the said trustees, or by the treasurer or clerk to such trustees by action of debt, &c. in any of his majesty's courts of record; and applied as above mentioned."

If the gate-keeper, who is discharged, refuse to deliver up possession of the house, &c. the justices may, by warrant, or otherwise, remove him, with his goods.

† *Stat.* 52. Ninthly. As to officers in general, it is enacted, par. 54. "That if any toll-gatherer or gate-keeper, who shall be discharged by the trustees, shall refuse to deliver up the possession of the house, &c. within two days after notice of his discharge; or if the wife or family of any such, who shall die, shall refuse within 4 days after such new appointment shall be made, as aforesaid; any justice by warrant shall order the constable, or other peace officer, to remove the persons, together with their goods, out of such house, and to put the new-appointed officer into the possession thereof."

† *Stat.*

† *Stat.* 53. And it is further enacted, par. 55. "That the gate-keeper or toll-gatherer, and every surveyor shall, when required, by notice, in writing, from any 5 of the trustees, render upon oath, before one justice or trustee a true account in writing, of all monies received on account of such turnpike road, not before accounted for, under the penalty of 5*l.* to be recovered in a summary manner before any one justice, and applied to the use of the respective road on which such toll-gate shall be placed."

Gatekeepers and surveyors to a court of oaths, when required by the trustees, or justices.

† *Stat.* 54. And be it further enacted, par. 56. "That no gate-keeper or other person renting the tolls and residing in any toll-house, shall be removeable by any justices, in pursuance of any laws for the regulation of the poor, unless he become chargeable to the parish; and that no such gate-keeper, or person as aforesaid, shall thereby gain a settlement; and that no toll, nor any toll-house, nor any person in respect of such tolls or toll-house shall be assessed to the poor's rate, or any other public or parochial levy whatsoever."

No gate-keeper to be removed as a pauper, unless he is a fully chargeable, &c. nor shall he be assessed, &c.

† *Stat.* 55. And it is further enacted, par. 57. "That if any toll-gatherer or gate-keeper shall suffer any carriage to pass through any toll-gate or bar with any greater number of horses or beasts of draught, or with any carriage contracted or drawn in any other manner than is before directed, or without such names and descriptions painted thereon as are hereby directed, and shall not within one week proceed for the recovery of the forfeiture or penalty in the manner directed by this act, he shall forfeit 4*l.*"

Gatekeepers permitting to pass more carriages or horses than allowed by the act, or without proper description, &c. shall forfeit 4*l.*

† *Stat.* 56. And it is further enacted, by par. 45. "That all officers, appointed by any act for the repair of turnpike roads, their executors or administrators, shall, within 10 days after notice in writing by the trustees, or any 5 or more of them deliver up all books, accounts, papers, or writings whatsoever, relative to the execution of such respective offices on pain of forfeiting 20*l.*"

Officers, trustees, &c. to deliver up their accounts.

† *Stat.* 57. And it is further enacted, par. 65. "That every treasurer and surveyor shall, within one month after his appointment, give a bond to the trustees, with surety, in such penalty as the said trustees shall direct, for the paying and accounting for all money in his hands, or which he shall afterwards receive, as treasurer or surveyor, according to the directions of the several acts of parliament respecting such turnpike road, which bond shall be wrote upon paper without any stamp thereupon."—But by 23 Geo. 3. c. 18. s. 15. this exemption from stamps is repealed.

The treasurer and surveyors shall give bond with surety to the trustees, for the money in their hands.

§ 58. 12.

§ 58. Upon
evidence
convicted are
to be made, and
to be good
and valid
in all courts
of law and
equity.
§ 58. Ante,
p. 414.

† *Stat.* 58. It is also enacted, p. 73. "That every constable, headborough, or tythingman, refusing or neglecting to put this act into execution, or to account for and deliver any forfeiture or penalty, according to the directions of this act, and every surveyor, toll gatherer, and all other persons employed for the repairing roads, as shall receive salaries or rewards, who shall wilfully neglect for one week after the offence committed to lay such information upon oath before a justice for the limit wherein such offence was committed, shall, upon due information upon oath before one justice, forfeit 10*l*."

† *Stat.* 59. And it is further provided, par. 74. "That any justice may act in the execution of this act, notwithstanding he may be a creditor or a trustee for repairing or amending the roads on which any offence contrary to this act was committed."

† *Stat.* 60. And it is further enacted, par. 75. "That whoever shall resist or make forcible opposition to any person employed in the due execution of this act, or any particular act made for amending any particular highway, or shall assault any collector in the execution of his office, or shall pass through any turnpike gate, rail, or chain, or other fence, set up by authority of parliament, without paying the toll appointed to be paid at such gate or other fence, or make rescue of cattle, or any other goods detained by virtue of this act, or if any constable, headborough, or tythingman, shall refuse or neglect to execute any warrant granted by any justice, pursuant to the directions of this act, he shall, on conviction as above, forfeit not exceeding 10*l*. nor less than 4*0* s. in the manner directed by 13 Geo. 3. c. 78. s. 72."

§ 61. 12.
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† *Stat.* 61. Tenthly, as to the repair of altered turnpike roads, it is recited by the said statute, par 63. "And whereas parts of highways or turnpike roads have been, or may be, diverted and turned by legal authority, to make the same nearer or more commodious to the publick; and doubts have arisen, whether the inhabitants, or any particular person, is liable to repair the old highway or road, so deviated from by statute duty, tenure, or otherwise, ought to repair, or contribute to the repair of the whole, or some, and what part or proportion of such new highway or road. For obviating which doubts, and preventing disputes about the same be it enacted, par. 63. "That the inhabitants of every parish, township, or place, and persons liable as aforesaid, to the repair of any such old highway or road, shall respectively be and continue in the same manner liable to the repair

“ repair of such new highway or road, or so much thereof as shall be equal to the burden and expence, which he shall be exonerated, by turning the same, as aforesaid; ; and that if the parties cannot agree, the same shall be viewed by two justices, and settled, adjusted, and determined by them; and from and after such determination of the justices, the inhabitants, or the person liable to repair, shall bear all charges and expences of indictments and prosecutions for not repairing the same: and if it shall be found more convenient to fix a gross sum, or an annual sum, to be paid by any such inhabitants or person, instead of fixing the part or proportion of such new highway or road, to be repaired by him, the said justices may, with the consent of such person, and of the inhabitants interested therein, obtained at a vestry or publick meeting held for that purpose, and also of the trustees at a publick meeting, if it be turnpike road, order and direct the same accordingly; which order shall be, and for ever after continue, binding to all persons whomsoever.”

And if the parties cannot agree, it shall be viewed and settled by two justices of the peace. A gross or annual sum may be paid, if the parties agree thereto.

† Sect. 62. And it is further enacted, par. 33. “ That when the inhabitants shall be indicted or presented for not repairing any highway, being turnpike road, and the court shall impose a fine, the same shall be proportioned, with the costs and charges, between the inhabitants of the parish, township, or place, and the trustees of such turnpike road; and the court shall order the treasurer to pay the sum so proportioned, if it shall appear that the same may be paid without endangering the security of the creditors who have advanced their money upon the tolls to be raised thereupon.”

Where turnpike roads are indicted, the court may proportion the fine and costs between the inhabitants and the trustees.

Without endangering the security of the creditors.

† Sect. 63. Eleventhly, How far the powers of the highway act may be adopted, it is recited by the said statute, par. 70. “ That whereas the powers given by several turnpike acts are ineffectual for the purposes of digging, providing, and carrying materials, for the use of the turnpike roads therein described, and also for the purposes of enlarging, diverting, and turning such turnpike roads, and stopping up, selling, and disposing of the old roads so to be diverted and turned; and also for the making, opening, and cleansing of ditches and drains, and the cutting and pruning of hedges and trees; and also for the calling forth and compelling the performance of the statute duty which shall belong to such turnpike roads: and whereas more ample powers have been given in the acts for highways in general, (which highways comprehend and include turnpike roads); be it therefore enacted, That the surveyors shall, with the approbation of the trustees of every turnpike road, apply any part of the tolls and statute duty in the execution of all act or acts of parliament, for the amendment and preservation of the high-

When the powers for providing materials, cutting and turning turnpike road, making drains, pruning hedges and trees, and dealing with the statute duty, are ineffectual.

And where more ample powers for the same purposes are given by the highway act.

The surveyor of turnpike roads, with the approbation of the trustees, may exercise and enforce these powers upon and for the benefit of the turnpike

ways,

CHAPTER THE SEVENTY-SEVENTH.

OF NUSANCES RELATING TO BRIDGES.

AND now I am in the second place to consider nufances relating to bridges in particular; for the better understanding whereof I shall examine: How publick bridges are to be repaired by the common law. And how by the statute.

By the great charter c. 3. No town nor freeman shall be contrained to make

bridge nor banks, but such as of old time and of right have been accustomed. See also 2 Inst. 701. 1 Burr. 267.

As to the first point, I shall consider, First, In what manner, and by whom such bridges are to be repaired by common law. Secondly, In what manner persons bound to such repairs are to be proceeded against.

Sec. 1. As to the first of these particulars it seemeth to be clear, That those who are bound to repair such bridges, must make them of such height and strength, as shall be answerable to the course of the water, whether it continue in the old channel, or make a new one; and that they are not punishable as trespassers for entering on any adjoining land, for such purpose, or for laying thereon the materials requisite for such repairs. Also it seemeth to be clearly (a) settled, That of common right the charge of repairing all common bridges, lies upon the county wherein they are, unless part thereof be within a franchise; in which case it is said, That so much as is within the franchise, shall be repaired by those of the franchise.

44 Affix n. 43. Dalton c. 14

(a) 2 Inst. 701. Summary 133. C. 1. c. 165. C. 1. c. 137. Stat. 35, 359.

Sec. 2. Also it seemeth to be (b) certain, That such charge may be cast upon a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription; and that it may be cast upon any other persons (1) by reason of such a special tenure as hath been shewn more at large under the second general head of the precedent chapter. But it is (c) said, That a man shall not be bound to repair a new bridge built by himself, for the common

(b) 2 Inst. 700. 701. Summary 143. Dalton c. 14. Stat. 34, 55.

(c) 2 Inst. 701. C. Modern 107. Salk. 14 389.

C. Car. 365. 2 Black. 685. Burr. 2594.

(1) Therefore a tenant at will of a house which adjoins to a common bridge, although he is not bound between landlord and tenant to repair the house, yet if it become dangerously ruinous to the necessary entrance of the bridge, as tenant at will only, he is bound, *Ex injuncta officio*, to repair it, so far as to prevent the public being prejudiced. Lord Raym. 856.

good:

good: but that the county shall be bound to repair it, if it become of publick convenience. (2)

(2) Therefore where a particular district rebuilt a foot-bridge over a more convenient part of the stream, and converted it into a bridge for horse, carts, and carriages; as the district was not bound by custom to build or repair such a bridge, but a foot bridge only, and as they built a quite different bridge, in a different place, which proved of common publick utility to the county, the Court were unanimous, that the county, and not the district, were bound to repair it. Burr. 2554. Black/685.

SECT. 3. As to the second particular, *viz.* In what manner persons bound to such repairs, are to be proceeded against; it seemeth to be clear, (a) That any particular inhabitant or inhabitants of a county, or tenant or tenants of land charged to the repairs of such a bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs, and shall be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge, for the necessity of the case requires the greatest expedition in cases of this nature.

(a) 1 Jon. 273.

Popham 102.

6 Modern 307.

Salkeld 258.

11 Modern 158.

420.

Ed. Raym. 77.

792, 804, 805.

310, 311.

3175, 1100.

11 Mod. 307.

F. N. B. 11.

Regist. 218.

2 Inst. 17. Ind. 111.

(5) 1 Le. 112.

Popham 102.

43 Mod. 307.

8 Mod. 122.

2 Ashm. 37.

B. P. 110.

22, and 29.

SECT. 4. Also it hath been (b) resolved, That it is not sufficient for the defendants to an indictment for not repairing a bridge, to excuse themselves by shewing either that they are not bound to repair the whole, or any part of the bridge, without shewing what other person is bound to repair the same, and it is said that in such case the whole charge shall be laid upon such defendants, by reason of their ill plea.

See 1 Sid. 140.

SECT. 5. It is said, That where such defendants plead, that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney general in this special case may take a traverse upon a traverse, and insist that the defendants are bound to the repair, and traverse the charge alledged against *A. B.* and that an issue ought to be taken on such second traverse; and that the attorney general may afterwards surmise, that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury, &c. (3)

(3) Put the indictment ought to shew what sort of bridge it is, whether for carts and carriages, or for horse, carts, and carriages only. 11. Raym. 1175. And is the duty to repair arises by reason of the tenure of certain land, the indictment must shew where those lands lie. 2 Hale 181. And for the form of an indictment, vide 1 Burn 281.

6 Modern 307.

Lutw. 859.

SECT. 6. It seems that no inhabitant of a county ought to be a juror for the trial of an issue, whether the county be bound to such repairs or not, but it is said that he may be a good witness. (4)

(4) The same objection may be against the justices where they are all interested. In which case it shall be in the next county. Vide Burrow 859, 860. But by 1 Ann. an inhabitant may be a witness. Vide post. sect. 10.

SECT.

Stat. 7. As to the second point, *viz.* In what manner such bridges are to be repaired by statute. It is enacted by 22 Hen. 2. c. 5. "That the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the *quorum*, may inquire, hear, and determine, in their general sessions, of all manner of annoyances of bridges broken in the highways, to the damage of the king's liege people, and to make such process and pains upon every presentment afore them, for the reformation of the same, against such as owen to be charged for the making or amending of such bridges, as the king's justices of his bench use commonly to do; or as it shall seem by their discretions to be necessary and convenient for the speedy amendment of such bridges."

2 Inst. 701. 702.
6 Modan 255.

A remedy to
repair decayed
bridges.
12 Coke 31.
Popham 192.

Stat. 8. And it is farther enacted, par. 2 and 3. "That where it cannot be known and proved what hundred, riding, wapentake, city, borough, town or parish, nor what person certain, or body politick, ought of right to make such bridges decayed, by reason whereof such decayed bridges, for lack of knowledge of such as owen to make them, for the most part lie long without any amendment, to the great annoyance of the king's subjects; in every such case the said bridges, if they be without city or town-corporate shall be made by the inhabitants of the shire or riding, within which the said bridge decayed shall happen to be: and if it be within any city or town-corporate, then by the inhabitants of every such city or town-corporate wherein such bridges shall be. And if part of any such bridges so decayed happen to be in one shire, riding, city or town corporate, and the other part thereof in another shire, riding, city or town-corporate, or if part be within the limits of any city or town-corporate, and part without, or part within one riding, and part within another, that then in every such case the inhabitants of the shires, ridings, cities or towns-corporate, shall be charged and chargeable to amend, make and repair such part and portion of such bridges so decayed, as shall lie and be within the limits of the shire, riding, city or town-corporate, wherein they be inhabited at the time of the same decays."

Justices may
proceed against
defaulters.

Stat. 9. And it is farther enacted, par. 4. "That in every such case where it cannot be known and proved what persons, lands, tenements, and bodies politick owen to make and repair such bridges, that for speedy reformation and amending of such bridges, the justices of the peace within the shires or ridings, wherein such decayed bridges being out of cities and towns-corporate, and if it be within cities or towns-corporate, then the justices of peace within every such city or town corporate, or four of the said justices

Justices may tax
the inhabitants.
Vane 1 K 212
422.

ces

Vile infra.
32 Geo. 2.
Which seems
to make this
part of the act
useless.

Two collectors
to be made.
See vide infra, 1
Ann. c. 18. &c.

(A) The offi-
cers of the
shire or town
or parish, or
any of them,
usually chosen
by the justice,
to the choice of
the high constable
1 Geo. 1. B. 11.
280.

ces at the least, whereof one to be of the *quorum*, within
the limits of their several commissions and authorities, may
call before them the constables of every town and parish,
being within the shire, riding, city or town-corporate, as
well within liberty as without, wherein such bridges or
any parcel thereof shall happen to be, or else two of the
most honest inhabitants within every such town or parish
in the said shire, riding, city or town-corporate, by the
discretion of the said justices of peace, &c. And at and
upon the appearance of such constables or inhabitants the
said justices of peace, &c. with the assent of the said con-
stables or inhabitants, may tax, and set every inhabitant in
any such city, town or parish, within the limits of their
commissions and authorities, to such reasonable aid and sum
of money, as they shall think by their discretions convenient
and sufficient for the repairing, re-edifying, and amending
of such bridges, and after such taxation made, the said
justices shall cause the names and sums of every particular
person so by them taxed, to be written in a roll indented:
and shall also have power and authority to make two col-
lectors of every hundred, for collection of all such sums of
money by them set and taxed, which collectors receiving
the one part of the said roll indented, under the seals of
the said justices, shall have power and authority to collect
and receive all the particular sums of money therein con-
tained, and to distrain every such inhabitant as shall be
taxed, and refuse payment thereof, in his lands, goods and
chattels, and to sell such distress, and of the sale thereof
retain and perceive all the money taxed, and the residue,
(if the distress be better) to deliver to the owner thereof:
and that the same justices, or four of them, within the limits
of their commissions and authorities, may also name and ap-
point two surveyors (5) which shall see every such decayed
bridge repaired and amended from time to time as often as
need shall require, to whose hands the said collectors shall
pay the said sums of money, taxed and by them received,
and that the collectors and surveyors, and every of them, and
their executors and administrators, and the executors and
administrators of them, and every of them, from time to
time, shall make a true declaration and account to the justices
of peace of the shire, riding, city, or town corporate, wherein
they shall be appointed collectors or surveyors, or to four
of the same justices, whereof one to be of the *quorum*, of
the receipts, payments and expences of the said sums of mo-
ney: and if they or any of them refuse that to do, that then
the same justices of peace, or four of them, from time to
time by their discretions, shall have power and authority to
make process against the said collectors and surveyors, and
every

“ every of them, their executors and administrators, and the
 “ executors and administrators of every of them, by attach-
 “ ments under their seals, returnable at the general sessions
 “ of peace: and if they appear, then to compel them to ac-
 “ count, as is aforesaid; or else if they, or any of them, re-
 “ fuse that to do, then to commit such of them as shall refuse
 “ to ward, there to remain without bail or main, till the
 “ said declaration and account be truly made.”

§ 2. *re.* And it is further enacted, par. 5. “ That where
 “ any bridge or bridges lying in one shire or riding, and such
 “ persons inhabitants, bodies politick, lands or tenements,
 “ which owen to be charged with the making and amending
 “ of such bridges, lien and abiden in another shire, or riding,
 “ or where such bridges been within any city or town corpo-
 “ rate, and the persons inhabitants, bodies politick, lands or
 “ tenements, that owen to make or repair any such bridges
 “ lien and been out of the said cities and towns corporate, in
 “ every such case the justices of peace of the shire, city, or
 “ town corporate, within which such decayed bridges, or any
 “ part thereof, shall happen to be, shall have power to enquire,
 “ hear and determine all such annoyances, being within the
 “ limits of their commissions and authorities. And if the an-
 “ noyance be presented, then to make process into every shire
 “ within this realm, against such as owen to make or amend
 “ any such bridges so presented before them to be decayed, to
 “ the annoyance and let of the passage of the king’s subjects,
 “ and to do further in every behalf in every such case, as they
 “ might do by authority of the said act, in case that the per-
 “ sons, &c. which owen to be charged to the amending or
 “ making of such bridges, &c. were in the same shire, &c.
 “ where such annoyance shall happen to be. And that all
 “ sheriffs, and bailiffs of liberties and franchises, shall truly
 “ serve and execute process as shall come to their hands from
 “ the said justices of peace, afore whom any presentment shall
 “ be had for any such annoyance, according to the tenor and
 “ effect of the said process to them directed, &c. on pain to
 “ make such fine as shall be set on them by the discretion of the
 “ said justices.”

Justice may
 a. b. process
 c. d. every shire.

Within the shire
 a. b. c. d. e. f. g. h. i. j. k. l. m. n. o. p. q. r. s. t. u. v. w. x. y. z.

§ 3. *re.* But it is provided, par. 6. “ That nothing in
 “ the said act contained shall be prejudicial to the liberties of
 “ the five ports, or members of the same.”—And for reforma-
 “ tion of annoyance of bridges within the said ports and members,
 it is farther enacted, par. 7. “ That the warden, mayors, and
 “ bailiffs elected, and jurats of the same ports, and every of
 “ them, have power and authority to enquire, hear, and de-
 “ termine all manner of common annoyances of bridges within
 “ the same ports and members, and to make such process, pains,
 “ taxations,

Cinque Ports
 a. b. c. d. e. f. g. h. i. j. k. l. m. n. o. p. q. r. s. t. u. v. w. x. y. z.

“taxations, and all other things within the same ports and members, as the justices of the peace may do in other shires or places out of the same ports, by virtue of the said act in every behalf.”

Allowance to
collectors.

Sec. 12. And it is farther enacted, par. 8. “That the said justices, &c. may allow such reasonable costs and charges to the said surveyors and collectors, as by their discretion shall be thought convenient.”

Of roads at the
ends of bridges.

Sec. 13. And it is farther enacted, par. 9. “That such part and portion of the highways in every part of this realm, as well within franchise as without, as lie next adjoining to any ends of any bridges within this realm, distant from any of the said ends by the space of 300 foot, be made, repaired, and amended, as often as need shall require; and that the justices of peace in every shire of this realm, franchise, city, or borough, or four of them at the least, whereof one to be of the quorum, within the limits of their commissions and authorities, may enquire, hear, and determine in their general sessions, all manner of annoyances of and in such highways, so being and lying next adjoining to any ends of bridges within this realm, distant from any one of the ends of such bridges 300 foot, and to do in every thing concerning the making, repairing, and amending such highways, &c. in as large and ample manner as they might and may do to and for the making, repairing, and amending of bridges, by virtue of the said act.”

2 Inst. 701.
Salk. 359.
6 Mod. 255,
256.

† *Sec. 14.* In the construction of this statute the following opinions have been holden: First, That no private bridges are within the purview thereof, but only such as are common in the highways, where all the king's liege people have or may have passage.

2 Inst. 701, 702.

Sec. 15. Secondly, That unless the justices of the peace of a county, or town, &c. be four in number, and one of them of the quorum, they have no manner of jurisdiction by virtue of this statute; but it is said, That the justices of the peace of the county, in which such town, being not a county of itself, and wanting such a number of justices, shall lie, may, by virtue of the first clause of the statute, determine all annoyances of bridges within such town, &c. if it be known what persons in certain are bound to repair the same: but if it be not known, it seems that such annoyances are left to the remedy of the common law, because the clause, which in such case authorises the justices of the peace to tax all the inhabitants,

tants, seems expressly to confine the power of taxing the inhabitants of such towns to their own justice, &c.

Sett. 16. Thirdly, That all householders dwelling in any county or town, &c. whether they occupy any lands or not; and also all persons who have lands in their own possession or manurance, whether they dwell in the same county, &c. or not; and also all bodies politic, either residing in, or having lands in their own hands in a county, &c. are liable to be taxed as inhabitants; within the meaning of the statute..

Sett. 17. Fourthly, That the taxation to be made in pursuance of the statute ought to be assessed distinctly on each inhabitant, and not on a whole hundred, parish, or town in general.

Sett. 18. Fifthly, That all privileges of exemptions and discharges from contribution to the repairs of decayed bridges, whether such exemptions were originally derived from charter or act of parliament, or any other foundation whatsoever, are taken away by the express words of the statute, "That the justices, &c. shall tax and set every inhabitant."

Sett. 19. It hath been questioned whether a borough, which hath no bridge within its own limits, be not liable to contribute to the repairs of a county bridge.

+ *Sett.* 20. And to prevent more money being raised than is necessary, and to direct the application of what is raised, it is enacted, by 1 Anne, st. 1. c. 18. "That the justices in sessions shall have full power, upon due presentment to them made that any bridge within their respective jurisdictions is out of repair, and which by them hath usually been or ought to have been repaired, to assess every town, parish, or place within their respective commissions in the usual proportions toward the repair of bridges, to be levied and collected by the constables or by such other person or persons, as the said justices in sessions shall direct, and paid by the said collectors to the high constables of every hundred in 6 days after they shall have received the same, and the high constables shall in 10 days after the receipt thereof pay the same to such person as the said justices shall, in sessions, appoint to be treasurers of the same (allowing the said persons not exceeding 3 d. in the pound) to be employed and accounted for according to the orders and directions of the said justices for and towards the amending of such decayed bridges and the highways at the end of such bridges as need shall require, which assessments shall be levied by distress within 10 days after demand, and every constable or other

2 Inst. 703.

2 Inst. 704.

Vide 1 Keb. 91.

2 Inst. 704.

1 Kibb 63.

Vide the next section where the charges are directed to be paid out of the county rate.

Moore 107.

2 Hale 181.

(a) A *certiorari* lies such an order of justices concerning a private bridge, pursuant to a private statute; but they ought to return the act upon which their order is founded. Dult.

504. And it has been determined that this act of Queen Ann extends only to bridges where the county is charged to repairs and that where a private person or parish is charged the 5 and 6 Will. 3. c. 11. hath allowed the granting a *certiorari*. Strange 900.

The expence of repairing bridges to be raised by a county rate.

† *Stat. 21.* It is also enacted, by 12 Geo. 2. c. 29. s. 13. for the more easy assessing, levying and collecting the county rates, “ That no part of the money to be raised and collected in pursuance of this act shall be applied to the repairs of any bridges, &c. until presentments be made by the respective grand juries, at the assize, great sessions, general gaol delivery, or general or quarter-sessions of the peace, held for the county or place of the insufficiency, inconvenience, or want of reparation of their bridges, &c. &c.”

Justices may contract for the repair of bridges.

† *Stat. 22.* Also, it is further enacted, par. 14. “ That when any public bridges, ramparts, banks or cepts or other works are required to be repaired at the expence of any county or place, the justices of the peace at their grand or quarter sessions respectively, or the greater part of them then and there assembled, if they think proper and convenient, after presentment to be made as aforesaid of the want of reparation of such bridges, ramparts, banks or cepts, may contract and agree with any person or persons for rebuilding, repairing and amending the same, and all other works which are to be repaired and done by assessment in the respective counties or places, for any term or terms of years not exceeding seven years at a certain annual sum, payment or allowance for the same; such contractor or contractors giving sufficient security for the due performance thereof to the clerk of the peace or other officer of the place respectively; and such justices at their respective general or quarter sessions shall give public notice of their intention

“intention of contracting as aforesaid; and such contracts shall be made at the most reasonable price proposed; and all contracts when agreed to, and all orders relating thereto shall be entered in a book to be kept by the clerk of the peace or other officer respectively for that purpose, and kept among the records of the place, to be from time to time inspected by any of the said justices within the limits of their commissions and by any person or persons employed concerning the same without fee or reward.”

† *Sett. 23.* It is also further enacted, by 14 Geo. 2. c. 33. Justices may purchase the adjoining land to rebuild.
 “That the justices of the peace of any county or place, at their general sessions or general quarter sessions assembled or the major part of them, shall have power to purchase of, or agree, or contract with any person or persons, bodies politic or corporate for any price or parcel of land adjoining or near to any county bridge within the limits of their respective commissions, for the more commodious enlarging, or convenient rebuilding of the same; which pieces or parcel of land shall not exceed one acre in the whole for any such bridge and shall from time to time be paid for by the respective county treasurers out of any monies raised or to be raised by virtue of 12 Geo. 2. c. 29; such treasurers being thereunto authorised by orders under the hands and seals of the justices at sessions or the major part of them; which lands so purchased shall be conveyed as the said justices in sessions shall appoint, in trust, for the uses and purposes of enlarging or rebuilding such bridges respectively.”

CHAPTER THE SEVENTY-EIGHTH.

OF NUSANCES RELATING TO PUBLIC HOUSES.

FOR the better understanding of nuisances relating to public houses, I shall consider: In what manner they are prevented and restrained by the common law, and in what manner by statute.

Sett. 1. As to the first point it seems to be agreed, That the keeper of an inn may, by the common law, be indicted and fined, as being guilty of a publick nuisance (a) if he usually harbour thieves, or persons of scandalous reputation, or (b) suffer frequent disorders in his house, or take exorbitant prices, or set (c) up a new inn in a place, where there is no manner of need of one, to the hindrance of other ancient and well

(a) 2 Hale 174.
Dalt. c. 7.
Palm. 34.
2 Roll. 345.

governed inns, or (a) keep it in a place in respect of its situation wholly unfit for such a purpose.

(b) Palm. 374.
2 Roll. 345.
(c) 10 H. 7. 8.
26 H. 5. 18. 19.
9 Coke 57.
(d) De. 158.
B. Ac. fut. cas.
70. 72.
(e) H. P. C. 126.
Dalton c. 7.
(f) 5 Et. 4. 2.
(g) Palm. 374.
2 Roll. 345, 350.
8 Co. Calvey
c. 17. Blacklety 109.

Sett. 2. And it seems also to be clear, That if one who keeps a common inn, refuse either to receive a traveller as a guest into his house, or to find him victuals, or (b) lodging, upon his tendering him a reasonable (c) price for the same, he is not only liable to render (d) damages for the injury in an action on the case at the suit of the party grieved, but may also be (e) indicted and fined, at the suit of the king. — Also it is said, That he may be compelled by the constable (f) of the town to receive and entertain such a person as his guest, and that it is no way (g) material whether he have any sign before his door or not, if he make it his common business to entertain passengers.

(f) 2 R. A.
84. 86.

Sett. 3. It seems to have been always clearly (b) agreed, That he who has an inn by prescription, may lawfully enlarge it upon the same land which has been used with it, either by erecting new buildings thereon, or turning stables into chambers of entertainment, and that he shall have the same privilege in such new parts of his house as in any of the old.

(i) 2 Roll. A. 84.
Salk. 45.
2 Roll. 345.
Palm. 367, 374.
2 Keb. 506.
1 Bull. 109.
Salk. 45.
Blackerby 170.
Godbolt 345.
Hutton 100.
C. 1. 1. 528.

Sett. 4. Also it seems to be (i) settled at this day, That any person may lawfully set up a new inn, unless it be inconvenient to the publick in some of the respects taken notice of in the first section, and that he has no need of any licence from the king for this purpose, for the keeping of an inn is no franchise, but a lawful trade, open to every subject. But if an inn degenerate into an ale-house, by suffering disorderly tipping, it shall be deemed as such.

Dalton 36. 133.
24. Vide 455.
sect. 12.

But it is said by Dalton, that inn keepers ought to have licence and be bound by recognizance for keeping good order as ale-house keepers are.

1 Burrow 22.

And by the commission of the peace, two justices, one whereof shall be of the quorum, may inquire of innholders, and of all and singular other persons, who shall offend in the abuse of weights and measures, or in the sale of victuals, against the form of the ordinances in that behalf made.

Vide F. N. B.
174.
Fag. 124.
Roll. 350.

Sett. 5. As to the second point, viz. In what manner nuisances of this kind are prevented and restrained by statute, it is enacted by 12 Edw. 2. c. 6. "That no officer in city or borough, that by reason of his office ought to keep ale-houses of wines and victuals, so long as he is attendant to
" that

“that office, shall not merchandize for wines nor victuals,
 “neither in gross nor by retail; and if any be convict of
 “such offence, the merchandize shall be forfeited to the king,
 “and the third part thereof delivered to the party that sued
 “for the same, &c.”

Sec. 6. And it is farther enacted by 6 Rich. 2. c. 9. Repealed by 7 Rich. 2. c. 11.
 “That no victualler shall have, exercise, or occupy any ju-
 “dicial office in any town, but only where no other person
 “sufficient may be found to have the same office. In which
 “case yet the same judge, for the time that he shall continue
 “in the said office, shall utterly omit and abstain himself and
 “his from the exercise of victualling, upon pain of forfeit-
 “ing his victuals so sold.”

Sec. 7. And it is farther enacted by 3 Hen. 8. c. 8.
 “That as often as any victualler chosen to bear any office
 “within any city, borough, or town-corporate, which for the
 “time that he shall stand and be in such office should have the
 “assessing and correction for selling of victuals, that then two
 “discreet and honest persons of the same city, borough, or
 “town-corporate, not being victuallers, nor any of them
 “being a victualler, shall be chosen by the commonalty of the
 “same city, borough, or town-corporate, in like form as
 “the said officer shall be chosen: which two persons, with
 “the said officer, shall be sworn truly to set and set the prices
 “and assizes of victual there, for the time that any such vic-
 “tualler shall abide in the same office: And that then it shall
 “be lawful to all and every of the said officers, after the same
 “victuals be set and setted by the same officer, and the said
 “two persons, or one of the same two persons, the other be-
 “ing absent, to merchant and sell wines, and all other vic-
 “tual in gross, and at retail, during the time that he shall be
 “in any such office, without any thing therefore to forfeit:
 “The said statute, act, and ordinance of 12 Edw. 2. or any
 “other act or acts, ordinance, or statute to the contrary made
 “in any wise notwithstanding.”

Sec. 8. Also it is enacted by 21 Jac. 1. c. 21. vide C. Jac. 60. 61. 2 Roll. 225, 226.
 “That all hostlers or inn-holders shall sell their horse-bread, and their
 “hay, oats, beans, pease, provender, and also all kind of vic-
 “tual, both for man and beast, for reasonable gain, having
 “respect to the prices for which they shall be sold in the mar-
 “kets adjoining, without taking any thing for litter.”

And it is farther enacted by the said statute, Carthew 152. Skinn. 291. Raym. d. 162. Roll. Ab. 95. 9 Hen. 6. 53.
 “That every hostler and innkeeper dwelling in any town or village,
 “being a thoroughfare, and no city, town-corporate, or mar-
 “ket town, wherein any common baker, having been an ap-
 “prentice to the trade for seven years, is dwelling, may make
 “within

" within his house horse-bread sufficient, lawful, and of due
 " assize, according to the price of grain or corn; any thing
 " in the said statute contained to the contrary notwithstanding."

And it is farther enacted, " That if the horse-bread,
 " which any of the said hostlers or innholders shall make, be
 " not sufficient, lawful, and of due assize, according to the
 " price of grain and corn, as abovesaid; or that if any of
 " them shall offend in any thing contrary to this act, the jus-
 " tices of assize, justices of oyer and terminer, justices of
 " peace, in every shire, liberty or franchise within this
 " realm, sheriffs in their turns, and stewards in their leets,
 " may inquire, hear, and determine the said offences of the
 " said hostlers and innholders, who shall be fined for the first
 " offence, according to the quantity of the offence, and for
 " the second offence shall be imprisoned for one month, and
 " for the third shall stand upon the pillory, &c."

Before this sta-
 tute it was law-
 ful for any one
 to keep in ale-
 house without
 licence, for it
 was a means of
 livelihood which
 any one was free
 to follow. But
 if it was disorderly

Stat. 9. And it is enacted by 5 and 6 Edw. 6. c. 25.
 " That the justices of peace within every shire, city, borough,
 " town-corporate, franchise, or liberty within this realm, or
 " two of them at the least, whereof one to be of the *quorum*,
 " shall have full power and authority within every shire, city,
 " &c. to remove, discharge, and put away common selling of
 " ale and beer in common ale-houses and tippling-houses."

kept it was indictable as a nuisance. Salk. 45.

Dalton c. 7.
 Hunt 170.
 Sum. 147.
 Id. Ray. 1303.
 1405.

Stat. 10. And it seems to have been the general opinion in
 the construction of this clause, that an alehouse keeper sup-
 pressed in pursuance of it, cannot be afterwards licensed again
 but in open sessions.

Salk. 45.

Stat. 11. And it is further enacted by the said statute of
 5 and 6 Edw. 6. c. 25. s. 1. 6 and 26 Geo. 2. c. 31. " That
 " none shall be admitted or suffered to keep any common
 " alehouse or tippling-house, except in fairs, but such as shall
 " be allowed in the open sessions, or by two justices of peace,
 " whereof one to be of the *quorum*. (1)

(1) The clause excepting fairs, in the several acts, arises from the necessity of the thing, respecting
 the accommodation of persons resorting thither. But those who shall brew such ale or beer to be
 sold by them in fairs, must take care to give notice to the gaugers that the same may be surveyed;
 for though they are exempted from taking licence, they must nevertheless pay the duties of excise.
 And this indulgence seemeth to be intended only in the place where the common fair is held; and
 not in any private house, which may be within the limits of the town where such fair shall be kept;
 especially where there are licensed ale-house sufficient. 3 Burn. 25.

† *Sec. 12.* But it is recited by 2 Geo. 2. c. 28. s. 11. The manner and time of granting licences.
 That many inconveniences have arisen from persons being licensed to keep inns and common alehouses (1) by justices of the peace, who living remote from the places of abode of such persons, may not be truly informed as to the occasion or want of such inns or common alehouses or the characters of the persons applying for licence to keep the same; it is therefore enacted by the 26 Geo. 2. c. 31. s. 4. "That licences for the purposes aforesaid, shall be granted but on the first day of September yearly, or within twenty days after; and that such licence shall be made for one year only to commence on the twenty-ninth day of the said September; and that the day and place for granting such licences shall be appointed by two or more of the justices acting for the division (2) (where the person to be licensed dwells) by a warrant under their hands and seals at least ten days before such meeting, directed to the high constable or high constables of the said division requiring him or them to order his or their respective petty constables or other peace officers to give notice to the several innkeepers and alehouse keepers within their respective countablewicks of the day and place of such meeting; and all licences hereafter granted at any other time or place shall be null and void to all intents and purposes whatsoever.—But by sect. 16. this act shall not extend to alter the time or times of granting such licences for keeping of common inns or ale-houses in any city or town-corporate. (3)

12 Mod. 254.
 2 Sess. Ca. 183.
 Andrew. 81.

For the penalties of issuing licences without being legally stamped. Vide 1 Ann. st. 2. c. 22. s. 6. 9 Ann. c. 23. 5 Geo. 1. c. 21. s. 45. 29 Geo. 2. c. 12. s. 20.

(1) Houses for the accommodation of persons who resort to the several watering places in the kingdom, where their respective owners, their guests lodge, board, diets their victuals, supply them with ale, beer and other liquors and entertain their horses at 8*d.* a day, but sell to no other persons nor ale-houses within this act.

(2) But it is not necessary to set forth specially in the licence that it was granted at a general meeting of the justices holden for the division; and therefore a conviction for keeping an ale-house without such licence, is not good upon the evidence of the licence only but there must be other evidence. 2 Sess. Ca. 183. Andrew. 81.

(3) In cities and towns-corporate such certificate is supposed not to be necessary by reason of the proximity of the persons to be licensed. 1 Burr. 27.

† *Sec. 13.* And it is also enacted by the said statute, "That upon granting licences by justices of the peace to any person to keep an alehouse, inn, victualling house, or to sell ale, beer, and other liquors by retail, every such person shall enter into a recognizance to the king in the sum of 10*l.* with two sufficient sureties each in the sum of 5*l.* or one sufficient surety in the sum of 10*l.* under the usual condition for maintenance of good order and rule within the same; and in case the person applying for such licence shall be hindered through sickness or infirmity or any other reasonable cause to be allowed by the said justices, to attend in

Justice's authorized to grant licences upon the party entering into a recognizance.

" person at the meeting of the same justices for granting the
 " said licences that it shall be lawful for them to grant
 " such licence upon two sufficient sureties entering into such
 " recognizance each in the penalty of 10*l.* for performance
 " of the condition of the said recognizance. (4)

(4) The court of King's Bench has no power to review the reasons upon which justices of the peace form their judgment in granting licences, by way of appeal from such judgments or overruling the discretion introduced to them. But it is clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion and have consequently abused the trust reposed in them; they are liable to prosecution by indictment or information or even possibly by action if the malice be very gross and injurious. But, if their judgment be wrong, and their heart and intentions be pure, God forbid, that they should be punished. Lord Mansfield. *Burrows* 536. Put on the contrary, if justices have acted from bad motives and *malâ fide*, in granting licences, the circumstance of their being intrusted with an absolute discretion forms the strongest case for the interposition of the court. *Burrows* 1716. 1786. A *mandamus* therefore will not lie to compel the justices to grant a licence. 1 *Barnard K. B.* 402. 1 *Burrows* 536. But the court, on affidavits importing a charge of corruption will call upon them to shew the reasons whereby they guided their discretions and will grant a rule to shew cause why they should not grant the licence, and if they do not shew sufficient cause the court will grant information. And for instance, of granting and refusing informations. Vide *Strange* 881. *Burrows* 653. 1317.

(c) The justices may suppress by order, without either information or conviction, or without a conviction, where the penalty is provided for, which ought to be by *stat. facinus* Id. *Raymond* 1203. 1406. Vide *Strange* 631. contra.

Stat. 14. And it is farther enacted, by 5 and 6 *Edw. 6.*
 c. 25. f. 3. " That the justices of peace of every shire,
 " city, borough, &c. may at their quarter-sessions by pre-
 " sentment, information, or otherwise by their discretion, in-
 " quire of all such persons as shall be allowed to keep any
 " ale-house or tippling-house, and that be bound by recogni-
 " zance, as is abovesaid, if any of them have done any act
 " whereby they have forfeited the same recognizance: And
 " the said justices shall upon every such presentment or infor-
 " mation, award process against every such person so present-
 " ed or complained upon before them, to shew why he should
 " not forfeit his recognizance, and may also hear and deter-
 " mine the same by all such ways and means, as by their dis-
 " cretion shall be thought good." (5)

If a justice take a licence without cause be that the recognizance have been fulfilled.

(6) If the justice commits without a summons he is liable to an information for the misdemeanor. *Strange* 678. 1. *Ray.* 1407. See *Cases* 353. 1. *Ray.* 1503. 1. *Ray.* 1405.

1 *Stat. 15.* And it is further enacted by 26 *Geo. 2.* c. 31.
 f. 7. " That any justice of the peace of any county, riding,
 " city, liberty, or town-corporate wherein such licence shall
 " be granted, upon complaint or information that such li-
 " censed person hath done or committed any act, offence or
 " misdemeanor, whereby in the judgment of the same justice
 " such recognizance may be forfeited, or the condition thereof
 " broken may by summons (6) under his hand and seal require
 " such person so complained of, or informed against to ap-
 " pear at the next general or quarter-sessions of the peace for
 " the said county, riding, city, liberty or town-corporate
 " then and there to answer to the matter of such complaint or
 " information; and also may bind the person or persons who
 " shall make such complaint or information or any other per-
 " son or persons in a recognizance to appear at such general
 " or quarter-session and give evidence against such person so
 " complained

“complained of or informed against; and the justices of the peace in their general or quarter-sessions shall have power to direct the jury which shall attend at such sessions for the trial of traverses or some other jury of twelve honest and substantial men to be then and there impanelled by the sheriff, without fee or reward, to inquire of the misdemeanor charged in the said complaint or information; and if such jury shall find that the person so complained of or informed against hath done any act whereby the condition of his recognizance is broken, such act being specified in such complaint or information, it shall be lawful for the court of session to adjudge such person guilty of the breach of such recognizance (7) which verdict and adjudication shall be final to all intents and purposes, and thereupon the said justices shall order the recognizance entered into by such offender to be estreated into the court of exchequer to be levied for his majesty's use; and that the said person the condition of whose recognizance shall be so adjudged to be broken and forfeited, shall from and after such adjudication be utterly disabled to sell any ale, beer, cyder, perry, spirituous liquors or strong waters for the space of three years, and any licence granted to such person during such term shall be void and of none effect—But the justices may adjourn the hearing and trial to the then next general or quarter-sessions where the same shall be finally determined.”

(;) There are two modes of suppressing a licensed ale-house: First, by proceeding on a breach of the condition of the recognizance; (but the party having another trade or being a bailiff can be no cause in such case.) Secondly, by indictment, and then there must be such disorders proved, as will amount to a nuisance. Salk. 45. for, except for disorder, the justices cannot suppress a licensed ale-house. Salk. 471. But where an ale-house is suppressed by indictment as a common nuisance; it is as to the person, not the house, for that may be licensed to a better man. Hutt. 100.

† “And by par. 11. If any person shall be disabled by conviction to sell ale, beer, cyder or perry; he shall by the same conviction be disabled to sell any spirituous liquors, any licence before obtained for that purpose notwithstanding, and every licence granted to him for selling ale, beer, cyder, perry or spirituous liquors shall be void, and if he shall sell during such disability he shall be punished, or for selling without licence, and a certificate from the clerk of the peace (which he shall grant without fee) of such conviction shall be legal evidence.”

Stat. 16. And it is farther enacted, by 5 and 6 Edw. 6. c. 25. s. 4. “That if any person, other than such as shall be allowed by the said justices, shall obstinately, and upon his own authority, take upon him to keep a common ale-house, or tippling-house, or shall contrary to the commandment

“mandment of the said justices, or two of them, use commonly selling of ale and beer, except in fairs; that then the said justices, or two of them, whereof one to be of the *quorum*, shall for every such offence commit every such person so offending, to the common gaol within the said shire, city, borough, &c. there to remain without bail or mainprize by the space of three days; and before his deliverance the said justices shall take his recognizance with two sureties, That he shall not keep any common alehouse, tippling-house, or use commonly selling of ale or beer, as by the discretion of the said justices shall seem convenient.”

The exciseman's book to be proof of a person living an alehouse-keeper.

† *Stat. 17.* And it is farther enacted by 26 Geo. 2. c. 31. §. 9. “That where any justice of the peace shall suspect that any alehouse-keeper, victualler, or retailer, sells ale, beer, cyder, or perry, without such licence, it shall and may be lawful for such justice to call such suspected person before him, and also any excise-officer or gauger to produce before such justice his stock book, or other account which such officer keeps, of the charge or survey of such suspected person in respect of any of the liquors aforesaid; and likewise to examine such excise-officer or gauger upon oath touching the manner in which such officer surveys or charges such suspected person in respect of any liquors aforesaid, or how or in what manner such suspected person actually pays the duties for any of the said liquors; and if it shall appear by such stock book or other account, or by the examination of the said officer or gauger, that such person so suspected of selling any of the liquors aforesaid, is surveyed as a victualler or retailer, and is charged with the same duties that victuallers and retailers are usually charged with, and pay for any of the liquors aforesaid, and is not intitled to the allowance or abatement given to common brewers, then and in such case such suspected person, shall be deemed an alehouse-keeper, victualler, retailer, or seller of any of the liquors aforesaid, to all intents and purposes, as if the same had been proved by two witnesses.”

Justices may examine person suspected not to be licensed.

† *Stat. 18.* And it is farther enacted, par. 10. “That if any person shall make information before any one justice, and shew probable cause that he suspects that any person sells ale, beer, or other liquors, without a licence from two justices, it shall be lawful for such justice to call such suspected person before him, and also to summon any other person as evidence, to prove the charge against such suspected person; and if such person so summoned shall refuse to appear, or when appearing shall refuse to be examined upon oath, and give evidence as aforesaid, such person or persons

“ persons shall forfeit the sum of 10*l.* to be levied by distress, &c. for the use of the poor where the offender shall live.” (8)

(8) The justices may suppress an unlicensed alehouse at discretion, for on the denial of a licence no appeal lies. And on the commitment of the owner of such unlicensed house, the want of a licence can only come in question, and not the reason why it was denied. *Salk.* 46.

Stat. 19. And it is farther enacted, by 3 Car. 1. c. 3. 8 *Modern* 175.
 “ That if any person shall upon his own authority, not being
 “ thereto lawfully licensed, take upon him to keep a com- *Strange* 555.
 “ mon alehouse or tippling-house, or use commonly selling of *Sess. Cal.* 264.
 “ ale, or beer, cyder, or perry, except in fairs, every such
 “ person shall for every such offence forfeit twenty shillings
 “ to the use of the poor of the parish where such offence shall
 “ be committed; the same offence being viewed by any
 “ mayor, bailiff, or justice of peace, or other head officer
 “ within the several limits, or confessed by the party so of-
 “ fending, or proved by the oath of two witnesses, to be
 “ taken before any mayor, bailiff, or other head officer, or
 “ any justice of peace, being within the limits of their com-
 “ mission.” (9)

(9) The remainder of this section which was recited in the former edition, prescribed the form in which the penalty should be levied, but as this part seems to be virtually repealed by 5 Geo. 3. c. 46. which prescribes the amount and

the manner of levying the penalties for this offence, I have omitted to insert sect. 39. page 464.

† *Stat.* 20. And it is farther enacted by 26 Geo. 2. c. 31.
 f. 4. “ That the said recognizance, with the condition thereof,
 “ fairly written or printed, shall forthwith, or at the next
 “ general or quarter sessions of the peace at farthest, after
 “ granting such licences, be sent or returned to the clerks of
 “ the peace, or persons acting as such, for every county,
 “ riding, city, liberty, or town-corporate in *England*, wherein
 “ such licences shall be granted, under the hands of the jus-
 “ tices of peace, before whom such recognizances were taken,
 “ to be by the said clerks of the peace, or such other person
 “ acting as such, duly entered or filed amongst the records
 “ of the sessions of the peace; and for every such licence
 “ granted without taking such recognizance, and for every
 “ such recognizance taken, and not sent or returned as
 “ aforesaid, every justice of the peace signing such licence,
 “ shall forfeit 3*l.* 6*s.* 8*d.* and by sect. 6. the forfeiture for
 “ granting licences without taking recognizances, shall be
 “ together with costs to him who shall sue.”

The clerk of the peace to return the recognizances to the sessions.

† *Stat.* 21. And it is also further enacted, by par. 5.
 “ That the clerks of the peace shall keep a register or calen-
 “ dar of all the recognizances so sent or returned, and shall
 “ deliver to the justices at their general meetings in Septem-
 “ ber, every year, for granting licences in each division,
 “ or place, a true copy of such register or calendar; and
 “ that

Of which they shall deliver an account to the justices at their yearly meetings.

“ that for every recognizance there shall be paid to the justices clerk, taking such recognizances to the clerk of the peace, as a fee for recording, and for making and delivering copies as aforesaid, one shilling, and no more, by the person licensed, over and above the fees payable to the said justices clerks.”

Conviction of
unlicensed per-
sons to be re-
turned, &c.

† *Stat. 22.* And it is further enacted by par. 13. “ That every conviction of any offender for selling ale, beer, or other liquors without such licence, or after being disabled to sell as aforesaid, shall be certified by the justice of peace making the same, to the next general or quarter sessions to be filed and entered among the records of the said session : and there shall be added that the same is the first, second or third conviction.—Provided always, that the offender who shall be punished by virtue of this act, shall not be punished for the same offence by virtue of any former act, and *conversely*. Nor shall this act extend to the two universities.”

The number of
alehouses to be
licensed in a
borough, &c.

† *Stat. 23.* And it is further enacted by the above-mentioned statute 26 Geo. 2. c. 31. par. 2. for the better preventing disorders in alehouses, “ That no licence shall be granted to any person (except in cities, and towns corporate, s. 16.) not licensed the year preceding, unless such person produce at the general meeting of the justices in September, a certificate under the hands of the parson, vicar, or curate, and the major part of the churchwardens and overseers, or else of three or four reputable and substantial householders and inhabitants of the parish or place where such alehouse is to be, setting forth that such person is of good fame, and of sober life and conversation; and it shall be mentioned in such licence that such certificate was produced, otherwise such licence shall be null and void.” (10)

1 Burr. 557,
558.

(11) In cities and towns corporate such certificate is supposed not to be necessary, by reason of the propriety of the person to be licensed. 1 Burr 77. Yet it is discretionary in the justice to whom the writ licence, and a mandamus will not lie to compel the justices, because the reasons why it was denied extend to themselves. 4 Str. 881.

How in cases of
death the licence
may be renewed.

† *Stat. 24.* And it is further enacted by said statute, par. 3. “ That if any licensed person shall die, or remove from an alehouse, it shall be lawful for the person succeeding to such house, to keep on the said alehouse during the residue of the term of such licence, on condition that within thirty days after such death or removal, such person obtain such certificate as aforesaid, (11) to be signed by some neighbouring justice, in order to its being produced at the next general meeting in September; and if such certificate be
“ not

(12) B. 24 Geo. 2. c. 31. s. 12. c. 23. The necessity for a certificate is suggested with in the representative of the party dying.

“ not so obtained and signed within the said thirty days, then immediately from and after the expiration thereof, such licence shall be null and void; and no licence shall entitle any person to keep an alehouse in any other place than that in which it was first kept by virtue of such licence; and such licence with regard to all other places, shall be null and void.”

Viſq infra,
ſect. 35.

† *ſect.* 25. And it is further enacted by 26 Geo. 2. c. 13. ſ. 11. “ That no juſtice of the peace being a common brewer of ale or beer, innkeeper or diſtiller, or a ſeller of or dealer in ale or ſpirituſous liquors, or intereſted in any of the ſaid trades, or being a victualler or malſter, ſhall be capable, or have any power to grant licences for ſelling ale or beer, or any other liquors, but the ſame ſhall be void.”

No juſtice who
deals in malt
or ſpirituſous
liquors, ſhall
interfere in
granting licen-
ces.

† *ſect.* 26. And by 4 Jac. 1. c. 4. “ If any perſon ſhall ſell or deliver any beer or ale to any perſon that ſhall then ſell beer or ale, as a common tippler, or alehouſe keeper; the ſame perſon not having a licence to ſell ale or beer, (except it be for the uſe of his houſehold only); he ſhall forfeit for every barrel 6s. 8d. and ſo proportionally for other quantities; half to the poor, and half to him that ſhall ſue in ſeſſions by action of debt, information, indictment, or preſentment.

Forfeiture for
ſelling in an un-
licenſed houſe.

† *ſect.* 27. It is enacted by 2 Geo. 2. c. 28. ſect. 10. “ That no perſon or perſons whatſoever ſhall ſell brandy or other diſtilled liquors by retail, to be drank in his, her, or their, houſe or houſes, but ſuch perſons only as ſhall be thereunto licenſed, in the ſame manner, and liable to the ſame laws, as common alehouſe keepers.”

Sellers of ſpi-
rituſous liquors to
be licenſed in the
ſame manner as
alehouſe keepers.

† *ſect.* 28. And by the 30 Geo. 2. c. 17. ſect. 10, 11. “ No perſon or perſons ſhall be enabled to ſell made wines, to be drank in his, her, or their houſe or houſes, unleſs firſt licenſed by two juſtices of the county, or place where the ſame are ſold; and no ſuch licence ſhall be granted but to perſons who ſhall keep publick victualling houſes, inns, coffeehouſes, or alehouſes.”

Seller of wines
alſo muſt be li-
cenſed.
For the ſump-
tuous duties on wine
licenſes, vide
9 Anne, c. 23.
— 37. Geo. 2.
c. 19. and
31 Geo. 2. c. 35.
ſ. 7.

† *ſect.* 29. And it is further enacted by 16 Geo. 2. c. 8. ſect. 8. “ That no perſon ſhall preſume to retail any brandy, rum, arrack, uſquebaugh, geneva, aquavitz, or any other diſtilled ſpirituſous liquors, or ſtrong waters mixed or unmixed, by whatever name they may be called, publickly or privately, without firſt taking out a licence (12) for that purpoſe, within ten days at leaſt before they ſhall retail the ſame, and for which they ſhall pay 20 s. : which licence, if taken out within the bills of mortality, ſhall be under the hands and ſeals of two of the commiſſioners of exciſe, &c. But if
“ taken

Sellers of ſtrong
waters, &c. muſt
be licenſed.
(12) Vide 1 Burn
22 for an obſer-
vation on the
double licence
required for re-
tailing malt li-
quors and ſpi-
rituſous liquors,
and the attempt
made by the ex-
ciſe office to

keep their jurisdiction distinct from the justices.

By 2 Geo. 2. c. 28. s. 10. Justices of the peace and other officers shall have the same jurisdiction over such retailers of spirituous liquors as they have over alehouse keepers.

Sellers of less than two gallons to be deemed retailers.

Vide 11 Geo. 2. c. 26. s. 1. where clandestine sellers are deemed retailers. And 9 Geo. 2. c. 23. s. 16. where giving liquors to servants, or apprentices, fetching goods from shops, is deemed retailing. Vide also sect. 11. respecting paying wages in spirituous liquors.

To what kind of public-housekeepers licences shall be only granted.

Punishment on Persons selling distilled liquors without licence.

“ taken out without the limits aforesaid, then such licence shall be executed under the hands and seals of the several collectors and supervisors of excise within their respective districts; and a fresh licence shall be taken out ten days at the least before the expiration of the twelve months after the taking out of the first licence, and in the same manner to renew such licence from year, to year on pain of 10 l. or two months hard labour, until paid, on conviction by one justice. And by 24 Geo. 2. c. 40. sect. 11. and 26 Geo. 2. c. 13. sect. 8. it shall in no case be mitigated below 5 l.— And by 29 Geo. 2. c. 12. sect. 22. such person shall be first licensed to sell ale or spirituous liquors, by two or more justices of the peace.”—

† Sect. 30. And by 17 Geo. 2. c. 17. sect. 22. “ Every person who shall retail spirituous liquors mixed or unmixed, to be drank in any quantity whatsoever, in any place to him belonging, or shall retail, or send the same abroad in less than two gallons, shall be deemed a retailer.—And by sect. 19. no such licence shall be granted, except to such persons only who keep taverns, victualling houses, inns, coffeehouses, or alehouses; and all other licences shall be void; and if any licensed person shall exercise the trade of a distiller, grocer, or chandler, or keep a brandy shop for sale of spirituous liquors, the licence shall be void.”

† Sect. 31. And by 24 Geo. 2. c. 40. sect. 12. and 26 Geo. 2. c. 13. sect. 9. “ No licence shall be granted within the limits of the head office of excise in London, but to such as occupy tenements of 10 l. a-year, and pay parish rates for the same, or in places where the occupiers of houses are not rated to the church and poor, then to such persons as pay rent of 12 l. a-year, and not otherwise, nor to persons in any other part of the kingdom but such as pay to the church and poor: and no licence shall be of any avail longer than he shall be so qualified.”

† Sect. 32. And by 24 Geo. 2. c. 40. sect. 13. and 9 Geo. 3. c. 6. “ All the distilled liquors that shall be then, or at any time within six months after conviction of such unlicensed person, found in the custody, house, or other place occupied therewith, whether it be in his own occupation or not, shall, by warrant of the said commissioners, or of one justice, be seized and staved, or otherwise destroyed. And if any person shall offend again in like manner, the commissioners, or justices before whom he shall be convicted of such subsequent offences, may inflict the penalties by
“ any

“ any former law to be inflicted for such offence, and also
 “ commit the offender to the house of correction, not ex-
 “ ceeding three months.”

† *Sec.* 33. And by 24 Geo. 2. c. 40. sect. 41. “ The
 “ commissioners, or one justice on oath of any offence against
 “ this act, or any other act, for retailing of spirituous liquors,
 “ may grant a warrant to any of the peace officers, or other
 “ parish officers, to enter and search the houses and other
 “ places where the offence shall be sworn to have been com-
 “ mitted, or in the occupation of the persons sworn to be
 “ guilty thereof, and they may break open the doors if not
 “ opened on demand, and seize all such distilled spirituous li-
 “ quors as they shall there find, and detain the same till the
 “ offence shall be heard and determined; and if the offender
 “ be convicted, the liquors shall be forthwith staved; and if
 “ he be not convicted, the same shall be restored.”

Officers by war-
 rant may break
 open doors, &c.

† *Sec.* 34. And whereas the aforesaid penalty of 10 *l.* is
 sometimes insufficient to deter offenders, it is therefore enacted
 by 13 Geo. 3. c. 56. “ That whoever, for himself, or by
 “ any other person for his benefit, shall presume to retail any
 “ distilled spirituous liquors, or strong waters, without first
 “ taking out a licence for that purpose, in the manner before
 “ prescribed and directed, shall forfeit 50 *l.* for each offence,
 “ to be sued for, levied, recovered, and mitigated by any law
 “ of excise now in force, or by action of debt or information
 “ at Westminster, half to the king, half to the prosecutor:
 “ but this penalty shall not either by the commissioners or
 “ justices be reduced below 5 *l.*”

The penalty of
 retailing distil-
 led liquors with-
 out a licence,
 increased.

† *Sec.* 35. And it is further enacted by 29 Geo. 2. c. 12.
 sect. 32. “ That if any persons so licensed to sell ale, beer, or
 “ other exciseable liquors, shall die or remove from the ale-
 “ house, or other place wherein such ale, beer, or other li-
 “ quors, shall, by virtue of such licence, be sold, it shall and
 “ may be lawful for the executors, administrators, and assigns
 “ of such person so dying or removing, who shall be possessed
 “ of such house or place, or the occupier thereof, to sell ale,
 “ beer, or other liquors therein, during the residue of the
 “ term for which such licence shall have been granted to the
 “ person so dying or removing, without any certificate from
 “ any justice of the peace, or any new licence to be had and
 “ obtained in that behalf, any thing in 26 Geo. 2. or any
 “ other law to the contrary notwithstanding.”

The representa-
 tives of a publi-
 can may use the
 unexpired term
 of the licence,
 without the cer-
 tificate required
 by 26 Geo. 2.
 c. 31. Vide
 ante sect. 21.

† *Sec.* 36. And it is further enacted by said statute, sect.
 24. “ That in case any alehouse in England shall become
 “ empty or unoccupied after the general day appointed for li-
 “ censing, (the occupier whereof was duly licensed the year
 “ preceding)

How houses
 which become
 empty may be
 licensed.

“ preceding) it shall be lawful for any two of his majesty’s
 “ justices of peace at a petty sessions to grant a new licence
 “ to any new tenant or occupier to open such house, as an
 “ alehouse, or victualling house, and to sell ale there till the
 “ next general licensing day, so as the said licence be stamped
 “ as directed by the act: such new tenant or occupier obtain-
 “ ing such certificate as is directed and prescribed by 26 Geo.
 “ 2. c. 31. But this act not to extend to licences granted
 “ by commissioners of excise.”

Prison keepers
 selling liquors
 deemed ale-
 house keepers.

† *Secl.* 37. And by sect. 26. “ Every person who shall re-
 “ tail ale, beer, or other liquors, in any prison, or house of
 “ correction, or workhouse, shall be deemed keepers of com-
 “ mon alehouses and tippling houses, unless they shall obtain
 “ a licence according to law.”

Sellers of spiri-
 tuous liquors
 must have ale
 licences also.

† *Secl.* 38. And by 29 Geo. 2. c. 29. sect. 22. “ Neither
 “ the commissioners of excise, or any of the collectors or su-
 “ pervisors, or any other officers appointed to deliver licences
 “ to the retailers of any spirituous liquors or strong waters,
 “ shall grant or deliver any such licence to any person who
 “ shall not produce a licence, granted to him by justices of
 “ the peace to sell ale, beer, and other exciseable liquors,
 “ and stamped according to 9 Anne, c. 23.”

All the former
 penalties upon
 persons selling
 liquors without
 licence for that
 purpose, made
 uniform.

† *Secl.* 39. And whereas by the laws now in force, per-
 sons selling ale or beer, or other exciseable liquors by retail,
 without licence, are liable and subject by different laws to
 different penalties and punishments, which has occasioned
 much confusion, and an ill and improper use has been made
 thereof in many instances: for the prevention thereof it is
 enacted by 5 Geo. 3. c. 46. sect. 22. “ That every person
 “ lawfully convicted of selling ale or beer, or other exciseable
 “ liquors by retail, without being duly licensed so to do, shall,
 “ for every such offence, forfeit and undergo the several pe-
 “ nalties and punishments herein after mentioned, and pro-
 “ vided in that behalf, instead and in lieu of the several pe-
 “ cuniary and corporal punishments which they are now liable
 “ or subject to by any law now in force; that is to say, for the
 “ first offence the sum of 40 s. and also the costs and expence
 “ of convicting such offender; and in case such sum, together
 “ with the charges and expences of convicting such offender,
 “ shall not be paid within the space of fourteen days next
 “ after such conviction, that then the offender shall suffer im-
 “ prisonment for one month, unless the said penalty, and the
 “ costs, charges, and expences of such conviction shall be
 “ sooner paid; for the second offence 4 l. &c. and, if not paid
 “ within a week, two months imprisonment; and for the
 “ third, and every other offence, the sum of 6 l. &c. and, if
 “ not

How persons
aggrieved may
appeal.

N. B. There seems to be a mistake in setting forth that the costs shall be expressed in the warrant of distress; for no power of distress is given: The meaning seems to have been that the same shall be expressed in the conviction; as is required in the form prescribed by the 1st. 1 Burn 25. But by 9 Geo. 3. c. 6. this act shall not extend to alter any acts in force since the 8 Geo. 2. c. 18. relating to the selling of spirituous liquors by retail without licence.

† *Sec. 42.* But by par. 25. "Persons aggrieved by the conviction or judgment of any justice or justices of the peace, for any of the offences aforesaid, and shall give security to the satisfaction of such justice, &c. for payment of penalty, costs and expences, to be expressed in the warrant of distress on such conviction, may appeal to the next quarter sessions, unless the same be held within six days or less next after such conviction; and in that case to the justices assembled at the next sessions after such sessions, and not afterwards: and the judgment of such sessions shall be final and conclusive. And if such appeal be frivolous and vexatious, the party grieved by the same shall have costs, &c. not exceeding 5*l*."

Salkeld 45.

Publicans are
not to be allowed
tuppling in their
houses.

Sec. 43. Also it is enacted by 1 Jac. 1. c. 9. and 4 Jac. 1. c. 15. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. "That if any inn-keeper, victualler, or alehouse-keeper, or any keeper of a tavern, or one who sells wine in his house, and also keeps an inn, or victualling in his house, do permit or suffer any person, whether such person be an inhabitant of the place where such inn, &c. shall be, or not to continue drinking or tuppling in any inn or victualling-house, &c. other than such as shall be invited by any traveller, and shall accompany him only during his necessary abode there; and other than labouring and handicraftsmen in cities, and towns-corporate, and market towns upon the usual working days, for one hour at dinner-time, to take their diet in an alehouse; and other than labourers and workmen, who for the following of their work by the day, or by the great, in any city, town-corporate, market-town, or village, shall for the time of their said continuing in work there, sojourning, lodge, or victual in any inn, alehouse, or other victualling-house; or other than for urgent and necessary occasions, to be allowed by two justices of peace, That then every such inn-keeper, &c. shall forfeit ten shillings to the use of the poor of the parish where such offence shall be committed; the same offence being viewed and seen by any mayor, bailiff, or justice of the peace within their several limits, or found by verdict on a trial upon an indictment at assizes, sessions, or court-leet, or proved by the oath of (1) one witness to be taken before any mayor or bailiff, &c. or any one justice of the peace, or by the voluntary confession of any offender, after which confession the oath of such offender shall be taken, and be a sufficient proof against any other offending at the same time."

4 Jac. 1. 3.

(2) 21 Jac. 1. 7.

Sec. 44. And it is farther enacted by the said statute of 1 Jac. 1. c. 9. par. 3. "That the said penalty of ten shillings shall be levied by the constables or church-wardens of the parishes where the offence shall be committed, by way of distress, and for default of satisfaction within six days, the same to be presently appraised and sold, and the surpluse to be delivered to the party of whom the distress was taken, and for want of sufficient distress the party offending to be by the said mayor, &c. committed to the common gaol, there to remain till the said penalty be paid. And if the said constables or church-wardens do neglect their duty in levying the said penalties, or in default of distress do neglect to certify the same within twenty days to the said mayor, &c. every person so offending shall forfeit forty shillings, to the use of the poor of the parish where such offence shall be committed, to be levied by distress of goods, by warrant from any one justice of peace, &c. to be taken and detained six days; within which, if payment be not made, the same goods to be appraised and sold, &c."

How the penalty for so doing is to be levied

Sec. 45. But it is provided by the said statute of 1 Jac. 1. c. 9. "That the punishment of such as shall offend against the same, within either of the two universities, or the precincts or liberties of the same, shall be done upon the offenders, and justice ministr'd in this behalf; according to the intent of the said law, by the governors, magistrates, justices of the peace, or other principal officers of either of the said universities, to whom in other cases the administration of justice, and correction and punishment of offenders by the laws of this realm and their several charters doth belong; and that no other within their liberties, for any matter concerning the said law contrary to their several charters, do intermeddle, and that all penalties to be forfeited by virtue of the said act, within either of the universities or the liberties or precincts of the same, shall be levied by the officers or ministers of either of the said universities, to be from time to time in that behalf appointed by the vice-chancellors thereof for the time being respectively, and that all powers and authorities given by the said act, shall by the governors, magistrates, and principal officers aforesaid, of either of the said universities, be duly executed within either of the said universities, &c."

How this offence may be punished in the universities.

Sec. 46. And it is farther enacted by 4 Jac. 1. c. 5. and 21 Jac. 1. c. 7. "That whoever shall be drunk, and within (a) six months after such offence shall be convicted thereof either on an indictment at assizes or sessions, or court-leet, or before any (b) justices of peace in any county, or any justice of peace, or other head officer in any city or town-
H h 2 corporate,

The punishment of drunkenness.

(a) 4 Jac. 1. c. 5. Stat. 11.

(b) 21 Jac. 1. 7. 4 Jac. 1. 5.

(a) Pl. 6.

T. 1. c. 1. 2.
Pl. 6.(c) 1. c. 1. 4.
1. 2. 1. c. 1. 7.

S. 1. c. 1. 1.

1. 4. c. 1. 1.
Pl. 6.

S. 1. c. 1. 1.

Offences to
be committed
offences.Eccles. 1. c. 1.
Justice 1. c. 1.

"corporate, upon view or confession or by oath of one witness, shall forfeit 5s. to be paid within one week after conviction, to the church-wardens of the parish where the offence shall be committed, &c. and if such person shall refuse or neglect to pay the said forfeiture, the same shall be levied of his goods by warrant or precept from the said court, or judge before whom the same conviction shall be: and if the offender be not able to pay the said sum of 5s. he shall be committed to the stocks for every offence, there to remain six hours; and if he shall be convicted a second time of the like offence, he shall be bound to the (a) good behaviour, with two sureties in a recognizance of 10l. And if any constable or other inferior officer of the place where the offence shall be committed, &c. do neglect the due correction of the said offender, or the due levying of the said penalties, he shall forfeit 10s. to the use of the poor, &c. to be levied by way of distress, by warrant from any mayor, &c."

S. 1. 47. And it is further enacted by the said statute of Jac. 1. c. 5. and 21 Jac. 1. c. 7. and 1 Car. 1. c. 4. "That if any person shall remain or continue drinking or tippling in any inn, victualling-house, alehouse or (b) tavern, &c. whether he be an (c) inhabitant of the place at the time or not, drinking or not; and the same be viewed by any mayor, or other head-officer or justice of peace, or correction by the constable, or proved by one witness in the manner prescribed for the above mentioned offence of suffering tippling in public houses, unless it be in such cases as are excepted in the above mentioned act, relating to the said offence of suffering tippling, &c. Every person so offending, and being convicted within six months, shall forfeit 5s. or 14d. to the use of the poor of the parish where the offence shall be committed, to be levied by way of distress in such manner as the above mentioned forfeitures for drunkenness are to be levied. And if any such offender be unable to pay the said forfeiture, any mayor, head officer, justice of peace, or court where any such conviction shall be, may set him in the stocks for four hours."

S. 2. 38. And it is further enacted by the said statute of 4 Jac. 1. c. 7. 6. 7. "That all constables, church-wardens, headboroughs, tithingmen, aleconners and tidemen shall in their several oaths incident to their several offices, be charged in like sort to prevent the offences contrary to the said statute."

S. 2. 39. But it is provided by the same statute, par. 8. "That nothing therein contained shall in any wise abridge the"

“ the ecclesiastical jurisdiction.” And it is farther provided, Only one punishment.
 par. 9. “ That no offender, who hath once been punished
 “ for his offence against any article of the said act, by any
 “ the ways or means before limited, shall be efions punished
 “ for the same offence by any other ways or means.”

Sec. 50. And it is farther provided, par. 10. “ That Not to prejudice the rights of the universities.
 “ nothing in the said act contained shall be prejudicial to ei-
 “ ther of the universities, but that the chancellor, matter,
 “ and scholars, &c. may as fully use and enjoy all their ju-
 “ risdiccions, rights, privileges, and charters, as before the
 “ said statute they had or might have done; any thing in the
 “ said act to the contrary notwithstanding.”

Sec. 51. And it is enacted by 7 Jac. 1. c. 15. “ That Additional punishment.
 “ if any person being an alehouse-keeper, shall be lawfully
 “ convicted for any offence committed against any of the
 “ branches of either of the said acts of 1 Jac. 1. c. 9. or 4 V. 1. L. R. 21
 “ Jac. 1. c. 5. he shall for the space of three years next en- 15 3. 472
 “ suing the said conviction, be utterly disabled to keep any
 “ such alehouse.”

† *Sec. 52.* It is also enacted by 30 Geo. 2. c. 24. s. 14. Part of the act.
 “ That if any person or persons licensed to sell any sort of Not to prejudice the rights of the universities.
 “ liquors, or who shall sell or suffer the same to be sold in his, Not to prejudice the rights of the universities.
 “ her, or their house, or houses; or in any out-house, room, Not to prejudice the rights of the universities.
 “ or apartments thereto belonging, shall knowingly suffer
 “ any gaming with cards, dice, draughts, shuffle board,
 “ mulshippi, or billiard tables, skittles, nine pins or with any
 “ other implement of gaming by any journeyman, labourers,
 “ servants or apprentices; on conviction by confession, or on
 “ the oath of one witness, before any justice of the county
 “ or place within six days after the offence committed, he
 “ shall forfeit 40 s. and for every like offence afterwards 20 s.
 “ to be levied by warrant of distress, and three fourths thereof
 “ paid to the poor and the other fourth to the party on whose
 “ information the offender shall be convicted.”

† *Sec. 53.* And it is further enacted, “ That if any such And the person who is liable to be liable to pay from 5 to 20
 “ persons shall so game as aforesaid, and complaint thereof shall
 “ be made on oath to a justice of the place, he may issue his
 “ warrant to a constable to apprehend and carry such offender
 “ before a justice of the county, and on conviction as aforesaid,
 “ he shall forfeit from five to twenty shillings, or be
 “ committed to hard labour.”

CHAPTER THE SEVENTY-NINTH.

OF MONOPOLIES.

FOR the better understanding the nature of the offence of procuring or making use of a monopoly, I shall consider: First, What shall be said to be a monopoly: Secondly, In what manner the procuring, or making use thereof, are restrained by the common law: Thirdly, In what manner by statute.

4 Inst. 181.
Noy 182.
4 B. C. 159.

SECT. 1. As to the first point, it seemeth that a monopoly an allowance by the king, to any person or persons, of the sole buying, selling, making, working, or using of any thing, whereby any person is sought to be restrained from any freedom which he had before, or hindered from his lawful trade. (1)

(1) Monopoly and ingrossing differ only in this, that the first is by patent from the king, the other by act of the subject between party and party, but are both equally injurious to trade and the freedom of the subject, and therefore are equally restrained by the common law. Skinner 169.

As to the second point it seemeth, That the procuring or making use of such monopolies, is restrained by the common law two ways. First, By declaring all grants of this kind to be void. Secondly, By making those who procure or make use of them liable to be fined.

3 Mod. 124.
127. 7.
14 Co. 67.
1 Roll. 4.
2 Roll. 174.
Goob. 234.
2 Inst. 63, 67.
10 Mod. 131.
See Skinner
132 to 137.
166 to 173.
197 to 204.
223 to 225. East India Com. v. Synds.

SECT. 2. And first it is said, That all grants of this kind relating to any known trade are made void by the common law, as being against the freedom of trade, and discouraging labour and industry, and restraining persons from getting an honest livelihood by a lawful employment, and putting it in the power of particular persons to set what prices they please on a commodity; all which are manifest inconveniencies to the publick. (2)

(2) The king, and none but the king, Skinner 224. by his charter, may constitute fraternities for the management of foreign and domestic trade. 8 Co. 126. who may make by-laws in relation, if they be for the regulation of trade. See Com. Dig. by-law, b. 3. §. 3. Trade B. D. 1. D. 4. 10 Mod. 139.

(a) 2 N. Abr.
214. 3 Inst. 182.
4 Inst. 64.

SECT. 3. And upon this ground it hath been (a) resolved That the king's grant to any particular corporation of the sole importation,

importation of any merchandize is void, whether such merchandize be prohibited by statute or not. (3)

(3) Hence also it seems, that the king's charter, empowering particular persons to trade to and from such a place is void, so far as it gives such persons an exclusive right of trading and debarring all others: and it seems now agreed that nothing can exclude a subject from trade but an act of parliament. Ray. 489. Chan. Cr. 165. Vernon 127. Skinner 165. 3 Mod. 126. 3 Bacon 627. c. 3. Trade 4.

Sec. 4. And for the like reasons also it hath been resolved, That the grant of the sole (a) ingrossing of wills and inventories in a spiritual court, or of the sole (b) making of bills, pleas and writs in a court of law, to any particular person, is void.

(a) 2 R. Abr. 214.
(b) 1 Jones 231.
2 R. Abr. 214.
3 Mod. 75.
Vern. 120.
10 Mod. 107.
134. 133.

Sec. 5. Also it hath been adjudged, That the king's grant of the sole making, importing, and selling of (c) playing cards, is void, notwithstanding the pretence that the playing with them is a matter merely of pleasure and recreation, and often much abused, and therefore proper to be restrained; for since the playing with them is in itself lawful and innocent, and the making of them an honest and laborious trade, there is no more reason why any subject should be hindered from getting his livelihood by this than by any other employment.

(c) 11 Cr. 84.
85. &c.
Mod. 671.
Noy 13. &c.
2 Inst. 47.
Voe 2 Atkins
484.

Sec. 6. But it seemeth clear, That the king may, for a reasonable time, make a good grant to any one of the sole use of any art invented or first brought into the realm by the grantee, as shall be shewn more at large in the 14th, 15th, and 16th sections of this chapter. Also it seems to be the better opinion, That the king may grant to particular persons the sole use of some particular employments, (as of printing the holy scriptures and law books, (4) &c.) whereof an unrestrained liberty might be of dangerous consequence.

1 Mod. 256.
3 Keb. 792.
3 Mod. 75.

(4) The reasons given are, that the invention of printing was new; that it concerned the state, and was matter of public concern; that it was in the nature of a proclamation, and none could make proclamations but the king. And as to law books, that the king has the making of judges, sergeants, and officers of law; and that law books are printed in a particular language and character, &c. 3 Bac. Abr. 617. in notis. 2 Ch. Cr. 67. Skinner 234. (1 Burn E. L. 401. Barker's Case). 1 Vernon 120. 275. Carth. 90. Carter 89. 1 Mod. 256. 3 Cro. 227. 10 Mod. 107.

Sec. 7. Secondly, Also it is holden, That the procuring or making use of an unlawful monopoly is farther restrained by the common law, by subjecting those who are guilty thereof to a fine and imprisonment for the offence, as being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom. And it is said, That there are precedents of prosecutions of this kind in former days; but I cannot find any modern instance thereof.

3 Inst. 121.
2 Inst. 47. 61.

Sec. 8. As to the third point, *viz.* In what manner the procuring and making use of a monopoly are restrained by statute, it is declared and enacted by 21 Jac. 1. c. 3. "That all monopolies, and all commissions, grants, licences, charters and letters patent to any person or persons, bodies politic or corporate whatsoever, or for the sole buying, selling, making, working, or using of any thing within this realm, or Wales, or of any other monopolies, and all proclamations, commissions, restraints, warrants of assistance, and all other matters whatsoever any way tending to the instituting, strengthening, furthering, or countenancing of the same, or any of them, are altogether contrary to the laws of this realm, and so are and shall be utterly void, and of none effect, and in nowise to be put in use or execution."

Sec. 9. And it is further enacted, par. 2. "That no person, bodies politic and corporate whatsoever, shall be disabled and incapable to have, use, exercise, or put in use any monopoly, or any such commission, grant, or licence, &c. or other thing tending as aforesaid, or any liberty, power, or faculty, grounded or pretended to be grounded upon them, or any of them."

Sec. 10. And it is further declared and enacted, par. 4. "That all monopolies, and all such commissions, grants, and licences, &c. and all other things tending as aforesaid, and the force and validity of them, ought to be, and shall be examined, heard, tried, and determined, by and according to the common laws of this realm, and not otherwise."

Sec. 11. In the construction of this clause it hath been holden, That all matters of this kind ought to be tried in the courts of common law only, and not at the council table, or in the court of Chancery, or any other court of law nature. (5)

(5) The case of *Dr. Bonham v. College of Med. in London*, 11 Mod. 125, is the only case in which the court of Chancery has been held to have jurisdiction over a monopoly. The court held that the charter of the college was a monopoly, and that the court of Chancery had jurisdiction over it. The court also held that the charter was void, and that the college was not entitled to its privileges. This case is cited in *11 Mod. 125*, *126*, *127*, *128*, *129*, *130*, *131*, *132*, *133*, *134*, *135*, *136*, *137*, *138*, *139*, *140*, *141*, *142*, *143*, *144*, *145*, *146*, *147*, *148*, *149*, *150*, *151*, *152*, *153*, *154*, *155*, *156*, *157*, *158*, *159*, *160*, *161*, *162*, *163*, *164*, *165*, *166*, *167*, *168*, *169*, *170*, *171*, *172*, *173*, *174*, *175*, *176*, *177*, *178*, *179*, *180*, *181*, *182*, *183*, *184*, *185*, *186*, *187*, *188*, *189*, *190*, *191*, *192*, *193*, *194*, *195*, *196*, *197*, *198*, *199*, *200*, *201*, *202*, *203*, *204*, *205*, *206*, *207*, *208*, *209*, *210*, *211*, *212*, *213*, *214*, *215*, *216*, *217*, *218*, *219*, *220*, *221*, *222*, *223*, *224*, *225*, *226*, *227*, *228*, *229*, *230*, *231*, *232*, *233*, *234*, *235*, *236*, *237*, *238*, *239*, *240*, *241*, *242*, *243*, *244*, *245*, *246*, *247*, *248*, *249*, *250*, *251*, *252*, *253*, *254*, *255*, *256*, *257*, *258*, *259*, *260*, *261*, *262*, *263*, *264*, *265*, *266*, *267*, *268*, *269*, *270*, *271*, *272*, *273*, *274*, *275*, *276*, *277*, *278*, *279*, *280*, *281*, *282*, *283*, *284*, *285*, *286*, *287*, *288*, *289*, *290*, *291*, *292*, *293*, *294*, *295*, *296*, *297*, *298*, *299*, *300*, *301*, *302*, *303*, *304*, *305*, *306*, *307*, *308*, *309*, *310*, *311*, *312*, *313*, *314*, *315*, *316*, *317*, *318*, *319*, *320*, *321*, *322*, *323*, *324*, *325*, *326*, *327*, *328*, *329*, *330*, *331*, *332*, *333*, *334*, *335*, *336*, *337*, *338*, *339*, *340*, *341*, *342*, *343*, *344*, *345*, *346*, *347*, *348*, *349*, *350*, *351*, *352*, *353*, *354*, *355*, *356*, *357*, *358*, *359*, *360*, *361*, *362*, *363*, *364*, *365*, *366*, *367*, *368*, *369*, *370*, *371*, *372*, *373*, *374*, *375*, *376*, *377*, *378*, *379*, *380*, *381*, *382*, *383*, *384*, *385*, *386*, *387*, *388*, *389*, *390*, *391*, *392*, *393*, *394*, *395*, *396*, *397*, *398*, *399*, *400*, *401*, *402*, *403*, *404*, *405*, *406*, *407*, *408*, *409*, *410*, *411*, *412*, *413*, *414*, *415*, *416*, *417*, *418*, *419*, *420*, *421*, *422*, *423*, *424*, *425*, *426*, *427*, *428*, *429*, *430*, *431*, *432*, *433*, *434*, *435*, *436*, *437*, *438*, *439*, *440*, *441*, *442*, *443*, *444*, *445*, *446*, *447*, *448*, *449*, *450*, *451*, *452*, *453*, *454*, *455*, *456*, *457*, *458*, *459*, *460*, *461*, *462*, *463*, *464*, *465*, *466*, *467*, *468*, *469*, *470*, *471*, *472*, *473*, *474*, *475*, *476*, *477*, *478*, *479*, *480*, *481*, *482*, *483*, *484*, *485*, *486*, *487*, *488*, *489*, *490*, *491*, *492*, *493*, *494*, *495*, *496*, *497*, *498*, *499*, *500*, *501*, *502*, *503*, *504*, *505*, *506*, *507*, *508*, *509*, *510*, *511*, *512*, *513*, *514*, *515*, *516*, *517*, *518*, *519*, *520*, *521*, *522*, *523*, *524*, *525*, *526*, *527*, *528*, *529*, *530*, *531*, *532*, *533*, *534*, *535*, *536*, *537*, *538*, *539*, *540*, *541*, *542*, *543*, *544*, *545*, *546*, *547*, *548*, *549*, *550*, *551*, *552*, *553*, *554*, *555*, *556*, *557*, *558*, *559*, *560*, *561*, *562*, *563*, *564*, *565*, *566*, *567*, *568*, *569*, *570*, *571*, *572*, *573*, *574*, *575*, *576*, *577*, *578*, *579*, *580*, *581*, *582*, *583*, *584*, *585*, *586*, *587*, *588*, *589*, *590*, *591*, *592*, *593*, *594*, *595*, *596*, *597*, *598*, *599*, *600*, *601*, *602*, *603*, *604*, *605*, *606*, *607*, *608*, *609*, *610*, *611*, *612*, *613*, *614*, *615*, *616*, *617*, *618*, *619*, *620*, *621*, *622*, *623*, *624*, *625*, *626*, *627*, *628*, *629*, *630*, *631*, *632*, *633*, *634*, *635*, *636*, *637*, *638*, *639*, *640*, *641*, *642*, *643*, *644*, *645*, *646*, *647*, *648*, *649*, *650*, *651*, *652*, *653*, *654*, *655*, *656*, *657*, *658*, *659*, *660*, *661*, *662*, *663*, *664*, *665*, *666*, *667*, *668*, *669*, *670*, *671*, *672*, *673*, *674*, *675*, *676*, *677*, *678*, *679*, *680*, *681*, *682*, *683*, *684*, *685*, *686*, *687*, *688*, *689*, *690*, *691*, *692*, *693*, *694*, *695*, *696*, *697*, *698*, *699*, *700*, *701*, *702*, *703*, *704*, *705*, *706*, *707*, *708*, *709*, *710*, *711*, *712*, *713*, *714*, *715*, *716*, *717*, *718*, *719*, *720*, *721*, *722*, *723*, *724*, *725*, *726*, *727*, *728*, *729*, *730*, *731*, *732*, *733*, *734*, *735*, *736*, *737*, *738*, *739*, *740*, *741*, *742*, *743*, *744*, *745*, *746*, *747*, *748*, *749*, *750*, *751*, *752*, *753*, *754*, *755*, *756*, *757*, *758*, *759*, *760*, *761*, *762*, *763*, *764*, *765*, *766*, *767*, *768*, *769*, *770*, *771*, *772*, *773*, *774*, *775*, *776*, *777*, *778*, *779*, *780*, *781*, *782*, *783*, *784*, *785*, *786*, *787*, *788*, *789*, *790*, *791*, *792*, *793*, *794*, *795*, *796*, *797*, *798*, *799*, *800*, *801*, *802*, *803*, *804*, *805*, *806*, *807*, *808*, *809*, *810*, *811*, *812*, *813*, *814*, *815*, *816*, *817*, *818*, *819*, *820*, *821*, *822*, *823*, *824*, *825*, *826*, *827*, *828*, *829*, *830*, *831*, *832*, *833*, *834*, *835*, *836*, *837*, *838*, *839*, *840*, *841*, *842*, *843*, *844*, *845*, *846*, *847*, *848*, *849*, *850*, *851*, *852*, *853*, *854*, *855*, *856*, *857*, *858*, *859*, *860*, *861*, *862*, *863*, *864*, *865*, *866*, *867*, *868*, *869*, *870*, *871*, *872*, *873*, *874*, *875*, *876*, *877*, *878*, *879*, *880*, *881*, *882*, *883*, *884*, *885*, *886*, *887*, *888*, *889*, *890*, *891*, *892*, *893*, *894*, *895*, *896*, *897*, *898*, *899*, *900*, *901*, *902*, *903*, *904*, *905*, *906*, *907*, *908*, *909*, *910*, *911*, *912*, *913*, *914*, *915*, *916*, *917*, *918*, *919*, *920*, *921*, *922*, *923*, *924*, *925*, *926*, *927*, *928*, *929*, *930*, *931*, *932*, *933*, *934*, *935*, *936*, *937*, *938*, *939*, *940*, *941*, *942*, *943*, *944*, *945*, *946*, *947*, *948*, *949*, *950*, *951*, *952*, *953*, *954*, *955*, *956*, *957*, *958*, *959*, *960*, *961*, *962*, *963*, *964*, *965*, *966*, *967*, *968*, *969*, *970*, *971*, *972*, *973*, *974*, *975*, *976*, *977*, *978*, *979*, *980*, *981*, *982*, *983*, *984*, *985*, *986*, *987*, *988*, *989*, *990*, *991*, *992*, *993*, *994*, *995*, *996*, *997*, *998*, *999*, *1000*.

Sec. 12. And it is further enacted, par. 4. "That if any person shall be hindered, grieved, disturbed, or inquieted, or his goods or chattels any way seized, attached, distrained, taken, carried away, or detained, by occasion or pretext of any monopoly, or of any such commission, grant or

“or licence, &c. or other matter or thing tending as afore-
 “said, and will sue to be relieved in any of the premises, he
 “shall have his remedy for the same at the common law, by
 “action grounded on the said statute, to be heard and deter-
 “mined in the King’s Bench, Common Pleas, or Exche-
 “quer, against the party by whom he shall be so hindered or
 “grieved, &c. or by whom his goods shall be so seized or at-
 “tached, &c. wherein every such person, which shall be so
 “hindered or grieved, or whose goods shall be so seized
 “or attached, &c. shall recover three times so much as the
 “damages which he sustained by means of such hindrance,
 “&c. and double costs: and in such suits, or for the staying
 “or delaying thereof, no colour, protection, power of law,
 “aid, privilege, privilege, injunction, or order of restraint, shall
 “be in any way prayed, granted, allowed, or allowed, nor
 “any more than one instance: and if any person shall,
 “after notice that time depending is grounded upon the
 “said statute, cause or procure any action at the common
 “law, or in the court, to be stayed or delayed before judge-
 “ment, by colour or means of any order, warrant, power,
 “or authority, have only, of the court wherein such action
 “shall be depending, or after judgment shall come or pro-
 “ceed the execution to be stayed or delayed, by colour or
 “means of any order, warrant, power or authority, have on-
 “ly by writ of error or arrest, that then the said person or
 “persons so offending shall incur a penance.”

§. 1. 13. It is to be noted that the first branch of this last clause 31. 2. 23
 relating to the delaying or causing of this kind before judgment,
 doth only extend unto the Privy Council, Chancery, Exche-
 quer Chamber, and the like, but also to those who shall pro-
 ceed by warrant from the king for such purpose; and it is
 noted, that the latter branch relating to the delaying of execu-
 tion doth extend even to the judges of the court
 where the cause is depending.

§. 1. 14. But it is provided, par. 6. “That no declara-
 “tion in the statute mentioned shall extend to any letters pa-
 “tents and grants of privilege for the term of fourteen years,
 “or under, of the sole working or making of any manner of
 “new manufactures within this realm,” (under which words 31. 2. 43
 manufactures newly brought into the realm from beyond sea
 are included, though they were not new there) “to the true
 “and first inventor and inventors of such manufactures,
 “which others, at the time of making such letters patents
 “and grants, shall not use, so as also they be not contrary
 “to the law, nor mischievous to the state, by raising prices
 “of commodities at home, or hurt of trade, or generally in-
 “convenient; the said fourteen years to be accounted from
 “the

“ the date of the first letters patents, or grant of such privilege, but that the same shall be of such force as they should be, if the said act had never been made, and of none other.”

3 Inst. 184.

Stat. 15. It hath been resolved, That no new invention concerning the working of any manufacture is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one.

3 Inst. 184.
10 Mod. 181.

Stat. 16. Also it hath been holden, That a new invention to do as much work in a day by an engine, as formerly used to employ many hands, is not within the said exception, because it is inconvenient in turning so many labouring men to idleness. (6)

(6) Vide Arkwright's case.

4 Inst. 182.
6 Mod. 125.

Stat. 17. Also it seemeth clear, that no old manufacture in use before can be prohibited in any grant of the sole use of any such new invention.

Stat. 18. And it is farther provided, par. 7. “ That nothing in the said act contained shall extend to any grant or privilege, power, or authority whatsoever before the said act, made, granted, allowed, or confirmed by any act of parliament, so long as the same shall continue in force.”

Stat. 19. And it is farther provided, par. 9. “ That nothing in the said act contained shall be in anywise prejudicial to any city, borough, or town corporate within this realm, concerning any grants, charters, or letters patents to them made, or concerning any custom used by or within them, or unto any corporations, companies, or fellowships of any art, trade, occupation, or mystery, or to any companies or societies of merchants within this realm, erected for the maintenance, enlargement, or ordering of any trade or merchandize: but that the same charters, customs, corporations, &c. and their liberties and immunities shall be of such force and effect as they were before the making of the said act, and of none other, any thing before in the said act contained to the contrary in anywise notwithstanding.”

Stat. 20. And it is farther provided, par. 10. “ That nothing in the said act contained shall extend to any letters patents, or grants of privilege, concerning printing; nor to any commission, grants, or letters patents, concerning the digging, making, or compounding of saltpetre, or gunpowder,

“gunpowder, or the casting or making of ordnance, or shot for ordnance; nor to any grant or letters patents of any office erected before the making of the said statute, and then in being, and put in execution, other than such offices as had been decreed by proclamation; but that all such grants, &c. shall be of the like force and effect, and no other, as if the said act had never been made.”

Sec. 21. But it is enacted by 16 Car. 1. c. 21. “That it shall be lawful for all persons, as well strangers as natural born subjects, to import any quantities of gunpowder whatsoever, paying such customs and duties for the same as by parliament shall be limited: and that it shall be lawful for all his majesty’s subjects of this his realm of England, to make and sell any quantities of gunpowder at his pleasure, and also to bring into this kingdom any quantities of saltpetre, brimstone, or any other materials for the making of gunpowder: and that if any person shall put in execution any letters patents, proclamation, edict, act, order, warrant, restraint, or other inhibition whatsoever, whereby the importation of gunpowder, saltpetre, brimstone, or other the materials afore mentioned, shall be anywise prohibited or restrained, he shall incur a præmunire.”

Sec. 22. And it is farther provided by the said statute of 21 Jac. 1. c. 3. s. 11, 12. “That nothing in the said act contained shall extend to any commission or grant concerning the digging, compounding, or making of allum, or allum mines, &c. nor concerning the licensing of the keeping of any tavern or selling of wines, to be kept in the mansion-house, or other place, in the tenure or occupation of the party selling the same; and a farther provision is made in the latter part of the statute, for some particular grants to particular corporations and persons, as Newcastle upon Tyne, &c.”

Sec. 23. But it is said, That the said clause relating to allum was needless, because all such mines belong of course to the persons in whose grounds they are, and therefore no privilege concerning them can be granted but in the king’s own ground.

+ Sec. 24. And for the encouragement of learned men to compose and write useful books, and to prevent their being ruined by the piracy of booksellers, it is enacted by 8 Ann. c. 19. “That the author of any book or books, and his assignee or assigns, shall have the sole right and liberty of printing and reprinting such book or books for the term of

1 Jac. 2. c. 8.
5 Geo. 1. c. 26.
11 Geo. 1. c. 23.
4 Geo. 2. c. 29.
15 Geo. 2. c. 31.
28 Geo. 2. c. 33.
29 Geo. 2. c. 35.

12 R. 135.

Vide the case of
Mason v. Mar-
ray for publish-
ing Gray’s
Poems.

“fourteen

“ parts thereof, without the consent of the proprietor first
 “ had in writing, signed by him in the presence of two wit-
 “ nesses; or shall knowingly publish, sell, or expose to sale,
 “ or otherwise in any manner dispose of the same, &c. &c.
 “ such offender shall forfeit the plate and every impression
 “ thereof, and also five shillings for every print found in his
 “ custody, or sold or exposed to sale by him, half to the king,
 “ half to the prosecutor, if sued in three months. But this
 “ act shall not extend to the purchaser of plates.”—And by
 17 Geo. 3. c. 57. proprietors of prints may bring action on
 the case, and recover damages and double costs against per-
 sons copying their prints, in the whole or in part by vary-
 ing, adding, or diminishing without consent.

† Sect. 29. And by 15 Geo. 3. c. 53. “ The universities
 “ in *England* and *Scotland*, and the colleges of *Eaton*, *Wyl-*
 “ *mington*, and *Winchester* respectively, shall have for ever the
 “ sole liberty of printing and reprinting, but it must be at
 “ their own printing press, all such books as shall at any
 “ time heretofore have been, (or having not been heretofore
 “ published or assigned) shall at any time hereafter be be-
 “ queathed or otherwise given by the author or authors of the
 “ same respectively, or the representatives of such author or
 “ authors to or in trust for the said universities or colleges,
 “ or to or in trust for any college or house of learning within
 “ the same, unless the same have been or shall be given for
 “ any term of years or other limited term. And whoever
 “ shall print or sell the same contrary to this act shall, pro-
 “ vided the books be entered within two months after the
 “ bequest, in the manner the act directs, forfeit the same,
 “ and also one penny for every sheet, one half to the king,
 “ the other to the prosecutor. But the universities may sell
 “ copy right in like manner as any author.”

CHAPTER THE EIGHTIETH.

OF FORESTALLING, INGROSSING, AND REGRATING, AND OTHER OFFENCES OF THE LIKE NATURE.

FOR the better understanding the nature of Forestalling,
 Ingrossing and Regraving, and other such like offences,
 I shall consider, How such offences are treated by the com-
 mon law. And how by statute.

As to the first point, I shall consider: What is esteemed an offence of this kind by the common law. And how such offence is punishable by the common law.

Sec. 1. As to the first of these particulars it is said, That all endeavours whatsoever to enhance the common price of any merchandize, and all kinds of practices which have an apparent tendency thereto, whether by spreading false (a) rumors or by (b) buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same (c) market, or by any other such like devices, are highly criminal at common law, and that all such offences antiently came under the general notion of forestalling, which included all kinds of offences of this nature.

(a) 33 Aff. 38.
3 Inst. 105, 106.
B. La. 112m. 113
40.
Pickermant 180
(b) Crim. 134
(c) Crim. 50.

Sec. 2. And surely there can be no attempt of this kind, but must be looked upon as a high offence against the publick, inasmuch as it so apparently tends to put a check upon trade to the general inconvenience of the people, by putting it out of their power to supply themselves with a commodity, without an unreasonable expence, which often proves extremely oppressive to the poorer sort, and cannot but give just cause of complaint to the richest.

Sec. 3. But it hath been resolved, That any merchant, whether he be a subject or a foreigner, bringing victuals, or any other merchandize into the realm, may sell the same in gross, but that no person can lawfully buy within the realm any merchandize in gross, and sell the same in gross again, because by such means the price will be enhanced, for the more hands any merchandize passeth through, the dearer it must grow, because every one will make his profit of it: and if such practices were allowable, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit; which is of such dangerous consequence, that the bare ingrossing of a whole commodity with an intent to sell it at an unreasonable price, is an offence indictable at the common law, whether any part thereof be sold by the ingrosser, or not.

1 Inst. 106.
Summery 135.

C. Car. 251.
252.

Sec. 4. And so jealous is the common law of all practices of this kind, that it will not suffer corn to be sold in the sheaf, perhaps for this reason, because by such means the market is in effect forestalled.

31 E. 1. 17.
Summery 134.

Sec. 5. As to the second particular, viz. In what manner offences of this kind are punishable by the common law; it is said, That by an antient statute the offender was to be grievously amerced for the first offence; for the second, to be condemned to the pillory; for the third, to be imprisoned; and for

3 Inst. 123.

for the fourth to be compelled to abjure the vill: And there seems to be no doubt, but that at this day all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law.

As to the second point, *viz.* In what manner these offences are treated by statute, I shall consider; what particular provisions have been made relating to this matter.

The particular provisions of this nature are five-fold;
1. The obliging all victuallers to sell at a reasonable price.
2. The allowing all foreigners free liberty of importing and selling victuals. 3. The giving the great officers of state a power to raise the price of victuals. 4. The prohibiting conspiracies to raise the price of victuals. 5. The prohibiting all forestalling, ingrossing, and regrating.

How butchers
for the use of the
household
to be sold, and
vice versa, and
ingrossing, and
regrating, &c.
By 4 Hen.
3. c. 1. they
shall be
forfeited
twice the value.
By 21
Hen. 3. c. 1.
the chief
officers of the
town shall
be bound.

Stat. 6. The full of the said provisions depends upon 23 Edw. 3. c. 6. by which it is enacted, "That butchers, tallowmongers, regrators, hoilars, brewers, bakers, poultryers, and other sellers of all manner of victual, shall be bound to sell the same for a reasonable price, having respect to the price that such victual shall be sold at in the places adjoining; so that such sellers have moderate gains, reasonably to be required, according to the distance of the place from whence the said victuals be carried; on pain to forfeit double the value, &c. And the chief officers of towns are required to see this statute executed, on pain of paying the treble value of the thing sold, &c."

By 1 Jac. 1. c. 22. they are not to sell for less than four weeks end. By 1 Ann. c. 14. they are not to sell more than one day in a week. By 1 Ann. c. 14. they may sell less than one day.

Stat. 7. The second of the above-mentioned provisions depends upon 6 Rich. 2. c. 10. and 11 Rich. 2. c. 7. and 1 Hen. 4. c. 17. by which it is enacted, "That all manner of aliens, being of the amity of the king, coming into any town of the realm with fish, or other victual, shall be under the king's especial protection, and may cut their fishes and victuals in pieces, and in part, or in all, at retail, or in gross, as to them best shall seem, to sell and make their profit, &c."

And it is farther enacted by 14 Hen. 6. c. 6. "That if any man disturb any alien to sell his fish in gross, or at retail, in part or in whole, contrary to the above mentioned ordinances, and thereof be duly attainted at the suit of the king, or of the party, he shall forfeit 10 l. &c."

Stat.

Stat. 8. The third of the above mentioned provisions depends upon 25 Hen. 8. c. 2. by which it is enacted, "That to remedy the frequent rise of the price of cheese, butter, capons, hens, chickens, and other necessary victuals for man's sustenance, by ingrossing and regrating the same; the Lord Chancellor and other high officers of state, &c. may, upon complaint of any inhancing of the prices of such victuals without ground or reasonable cause, in any part of the king's dominions, set and tax reasonable prices of such victuals: And that after proclamation made of such prices, all farmers, owners, broggers, and all other victual-
 "le-s whatsoever, having or keeping any such victuals to the
 "intent to sell shall sell the same to such of the king's subjects
 "as will buy them at such prices as shall be taxed by such pro-
 "clamation, under the pains to be limited in the said procla-
 "mation."

Vide also 34
 Hen. 8. c. 3.
 22 Hen. 8. c. 1.
 27 Hen. 8. c. 9.
 which enjoin
 that butchers
 meat shall be
 sold by the
 pound, &c. But
 by 33 Hen. 8.
 c. 11. it may be
 sold by weight
 or otherwise.

Stat. 9. But it is provided, "That the officers of cities, boroughs, or towns-corporate, and all other persons having authority to set prices of such victuals, may set such prices in such manner as if the said act had not been made."

Stat. 10. The fourth of the above mentioned provisions depends upon 2 and 3 Edw. 6. c. 15. by which it is enacted, "That if any butcher, brewers, bakers, poulterers, cooks, collier-mongers or fruiterers, shall conspire, covenant, promise, or make any oaths, that they shall not sell their victuals but at certain prices; or if any artificers, workmen or labourers, do conspire, covenant, or promise together, or make any oaths, that they shall not make or do their works, but at a certain price or rate; or shall not enterprize, or take upon them to finish what another hath begun, or shall do but a certain work in a day, or shall not work but at certain hours and times; every such person so conspiring, &c. shall forfeit for the first offence 10 l. and if he pay not the same within 6 days, shall suffer 20 days imprisonment; and for the second offence shall forfeit 20 l. &c. and for the third, 40 l. &c. And if any such conspiracy, covenant, or promise be made by any society, brother-hood, or company, of any craft, mystery or occupation of the victuallers above mentioned, with the presence or consent of the more part of them, that then immediately upon such act of conspiracy, &c. over and besides the particular punishment before appointed, their corporation shall be dissolved; and that the said offences shall be determined at the assizes, sessions of the peace, or court-leet."

Vide 5 Eliz.
 c. 4.

† But by 2 Geo. 3. c. 14. "No brewer, innkeeper, victualler or other retailer of strong beer or ale shall be
 VOL. I. I i "such

“ sued impleaded or molested by indictment, information, popular action or otherwise, for advancing the price of strong beer or ale in a reasonable degree. And it is also enacted that if any brewer, innkeeper, victualler or retailer of beer or ale shall mix or cause, or suffer to be mixed in any vessel, tub, measure, or otherwise, any strong beer, ale or strong worts with any small beer or small worts or with water after the gauge of such strong beer, ale, or strong worts shall have been taken by an officer of excise he shall forfeit fifty pounds.”

† *Sec. 11.* The fifth of the above mentioned provisions, viz. the prohibiting all forestalling, ingrossing and regrating, depended chiefly upon 3 and 4 Edw. 6. c. 21. 5 and 6 Edw. 6. c. 14. altered by 5 Eliz. c. 5. f. 13. 5 Eliz. c. 12. and 13 Eliz. c. 25. f. 31. But it is recited by 12 Geo. 3. c. 71. “ That it has been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle and sundry other sorts of victuals by preventing a free trade in the said commodities, have a tendency to retard and to enhance the price of the same, which statutes if put in execution would bring a great distress upon the inhabitants of many parts of this kingdom and in particular upon those of the cities of London and Westminster, and therefore it is enacted that the “ 3 and 4 Edw. 6. c. 21.—The 5 and 6 Edw. 6. c. 14.— “ The 2 and 3 Philip and Mary, c. 3.—The 5 Eliz. c. 5. and “ c. 12.—The 15 Car. 2. c. 8. and so much of 5 Ann. c. 2. “ as relates to butchery selling cattle alive or dead, within “ London and Westminster and within 10 miles thereof, and “ also all acts for the better enforcement of the same, being detrimental to the supply of the labouring and manufacturing “ poor of this kingdom shall be and the same are hereby declared to be repealed.”

“ *But* 104
“ *105.*

† *Sec. 12.* But as the statute 5 and 6 Edw. 6. c. 14. particularly describes the several offences of forestalling, ingrossing, and regrating, which still continue offences at common law, it may be of use to recite it, notwithstanding it is repealed; as it contains a parliamentary description of those offences.

“ An indictment
“ on this statute
“ may be brought
“ against the
“ person bought
“ or sold, as
“ the statute is
“ directed to be
“ made.”
“ *Reland. Rep.*
“ 221.

† *Sec. 13.* For it is enacted by par. 1. of the said statute, “ That whosoever shall buy or cause to be bought, any merchandise, victual, or any other thing whatsoever coming by land or by water toward any market or fair to be sold in the same, or coming toward any city, port, haven, creek, or road of this realm or Wales, from any parts beyond the sea to be sold, or make any bargain contract or promise for “ the

“ the having or buying of the same, or any part thereof so
 “ coming as is aforesaid before the same shall be in the mar-
 “ ket, fair, city, or port, &c. ready to be sold, or shall make
 “ any motion by word, letter, message or otherwise to any
 “ person or persons for the enhancing of the price or dearer
 “ selling of any thing above mentioned, or else dissuade,
 “ move, or stir any one coming to the market or fair, to ab-
 “ stain or forbear to bring or convey any of the things above
 “ rehearsed to any market, city, or port, &c. to be sold shall
 “ be deemed. — A FORESTALLER.”

§ Sect. 14. And it is enacted by par. 2. “ That whoso- vide Coen 135.
 “ ever shall by any means regrate, obtain, or get into his
 “ hands or possession in any fair or market, any corn, wine,
 “ fish, butter, cheese, candles, tallow, tree, lambs, calves,
 “ hams, pigs, geese, capons, hens, chickens, pigeons, co-
 “ nars or other dead victual whatsoever, that shall be brought
 “ to any fair or market to be sold, and do sell the same again
 “ in any fair or market holden in the same place or within 4
 “ miles thereof shall be taken for — A REGRATOR.”

§ Sect. 15. And by par. 3. “ Whoever shall ingross or
 “ get into his hands by buying, contracting or promise taking,
 “ other than by demurr, grant, or lease of land, or tithes,
 “ any corn growing in the fields or any other corn or grain,
 “ butter, cheese, fish, or other dead victual whatsoever,
 “ within the realm of England to the intent to sell the same
 “ again shall be reputed — AN UNLAWFUL INGROSSER.”

§ Sect. 16. In the construction of the last mentioned clauses
 the following opinions have been holden. I. That (a) salt is (a) 104. 105.
106. 107.
Coen 131.
 a victual within the meaning of it, not only because it is of
 necessity of use for the food and health of man, but also be-
 cause it feedeth and maketh wholesome beef, pork, and
 other victual, in which respect it seemeth itself to come under
 the notion of victual, and seemeth to be so understood by the
 makers of 13 Eliz. 12. c. 25. as appears from par. 21. of
 that statute.

§ Sect. 17. II. That (b) such victual only as is necessary for (b) 104. 105.
106. 107.
Coen 135.
Coen 131.
 the food of man is within the purview of it; and therefore
 apples, and cherries, and such like fruits, are not within
 the intent of it; for the words are, corn, or grain, butter,
 cheese, fish, or other dead victuals, which words are said to
 import the same as if it had been said, or other dead victuals
 of like quality: Also it is said, That there is not any thing
 prohibited within the statute, but what hath a proviso, how
 in some kind it might be brought; and therefore since
 there is not any such proviso for apples, that they never were

(a) C. Car. 231. intended to be restrained : And agreeably hereto it hath been holden, That neither (a) hops nor (b) malt are within the meaning of the statute.
 (c) 1 Inst. 196.
 S. C. 132.
 C. 1 Owen 135.
 1 Roll 12.

Sec. 18. III. That the buying of corn, with an intent to make (c) starch of it, and then to sell it, is not within the said clause, because it is not bought to be sold again in the same nature in which it was bought, but to be first altered by a trade or science, and then sold again. And for the like reason it seemeth to be the better (d) opinion, That the buying of corn, in order to make meal of it, and then to sell it, is no way within the said clause ; and that the buying of (e) barley with an intent to make it into malt, and then to sell it, had no need of the exception made for it in the said statute.
 (c) Bridg. 5, 6.
 Owen 135.
 (d) Moore 595.
 Cro. Car. 231.
 Con Owen 135.
 (e) C. Car. 231.
 3 Inst. 196.
 S. C. 133. f. 15.
 28.
 C. 1 Owen 135.

Sec. 19. IV. That there is no necessity in an information or indictment grounded on the said clause for ingrossing any victual therein mentioned, to say (f) That the defendant did not come by it by a demise of land, &c. but that the defendant, if he have any such matter to alledge in his defence, may give it in eviience.
 (f) 1 Inst. 196.

Sec. 20. V. That in every such information, &c. the words of the statute must be precisely pursued, and therefore that it is not sufficient to say, That the defendant bought so much corn, &c. because the words are, " shall ingross, or get " into his hands, by buying, &c."

Sec. 21. And it is farther enacted by the said statute of 5 and 6 Edw. 6. c. 14. par. 4, 5, 6. " That whoever shall offend in any of the things before recited, and be thereof duly convicted, shall for the first offence suffer imprisonment for two months, and forfeit the value of the goods so by him bought or had; and for the second offence shall suffer imprisonment for one half year, and forfeit the double value of the goods, &c. and for the third offence shall be set on the pillory, and forfeit all his goods, and be committed to prison during the king's pleasure."

Sec. 22. And from hence it seems clearly to follow, as well as from the general rules of law, That no information for any of the above mentioned offences against the said statute, can be good, without shewing in certain the quantity of the thing in relation to which the defendant is supposed to have incurred the penalty, not only because otherwise the judgment to be given on such an information can never be pleaded in bar of any other, because it cannot appear that both of them were brought for the same thing, but also because it cannot appear to the court what forfeiture the defendant ought
 2 Roll 31.
 Cro. Car. 381.
 C. M. 1 r. 32.
 Vide into Cro.
 C. 1 314.
 3 Roll 11. 12.
 1 Jones 320.

ought to incur, unless the extent of the offence, which is to be the measure of it, be specially set forth : And for these reasons it hath been adjudged, That an information for ingrossing corn, the quantity whereof is expressed by the word *cubulus* only, is not good ; yet it is said, That an indictment for ingrossing *magnam quantitatem frumenti*, is sufficient.

APPENDIX THE FIFTEENTH:

OF REGULATING THE PRICE OF VICTUALS, &c.

THE statutes against the offences of forestalling, ingrossing, and regrating contained particular exceptions to the general restraints which they imposed. These exceptions related to corn, butter, cheese, cattle, beer, cyder, mum, fish, wine, oil, sugar, salt, fishmongers, victuallers, butchers, poulterers, badgers, drovers, lessors, shipping and castles, and towns corporate. Of the foregoing catalogue those exceptions which relate to fish, fishmongers, victuallers, butchers, poulterers, lessors, shipping and castles and towns-corporate are repealed. But as the intention of the legislature both in enacting and in repealing these statutes, in accommodation to the emergencies of different periods of time, was to regulate the price of victuals, and to prevent them from being exorbitantly raised upon, or improperly introduced to the public, by the respective dealers therein ; I shall endeavour to collect the several statutes which relate to the regulation under the following arrangement.

1. As to the measure of corn.
2. As to bread.
3. As to beer.
4. As to butter and cheese.
5. As to cattle and butchers.
6. As to fish.
7. As to bacon and pork.
8. As to hay and straw.
9. As to fruit.
10. As to honey and wax.
11. As to the measure of coals.

N. B. For the regulation of wood cut up for fuel, vide 43 Eliz. c. 14. 9 Ann. c. 15. and 10 Ann. c. 5.

† *Stat.* 1. And first. As to the measure of corn. It is enacted by 22 Car. 2. c. 8. f. That whoever shall sell any sort of corn or grain, ground or unground, or any kind of salt, usually sold by the bushel, by any other, than by Winchester measure, marked in his majesty's exchequer, and sealed as the act directs, containing eight gallons to the bushel and no more or less, and the said bushel stricken even by the wood or brim of the same by the seller, shall forfeit 40s. for every offence, on conviction, before one justice, by one witness; to be levied by the churchwardens, &c. by distress and sale; and in default imprisonment till paid."

† *Stat.* 2. And by par. 3. "If any mayor or other head officer shall knowingly permit the same, on conviction at the sessions, he shall forfeit 5 l. half to the prosecutor and half to the poor by distress, or imprisonment till paid."

† *Stat.* 3. And it is further enacted, by 22 and 23 Car. 2. c. 12. "That whoever shall sell or buy any corn ground or unground or salt by the bag without measuring being thereunto required or in any other manner than as above directed and that without shaking of the said bushel or measure by the buyer, shall forfeit beside the above penalty, all the corn, grain or salt bought or sold contrary to this act, or the value thereof, to the party complaining."

N. B.
standing in the
statutes the
measure of corn
differs in many
places the bushel
is greater
in price
another,
it is said that an ancient and uninterrupted custom, for this

† *Stat.* 4. And it is further enacted, par. 3. "That the proof shall lie upon the defendant to make it appear by the oath of one witness that he sold or bought the same lawfully, or, if he fail he shall forfeit as before mentioned, and which shall be distributed by the justice, half to the poor and half to the informer." (1)

Bar

(1) the mode by which the averaged price of corn is to be ascertained, vide 10 And for the same in London and Essex 21 Geo. 3. c. 50. For regulations respecting 22 Car. 2. c. 15. 17. 20. 5 Geo. 2. c. 11. 6 Geo. 5. c. 17. 13 Geo. 2. c. 39. Geo. 3. c. 25. 19 Geo. 3. c. 20. For regulating its exportation and M. c. 12. 1 Geo. c. 7. 11 Geo. 2. c. 22. 17 Geo. 3. 43. f. 5. 14 Geo. 2. c. 14 G. 3. c. 5. and 1 id 26. 16 Geo. 3. 37. 18 Geo. 3. c. 16.

General affize
and price of
bread.

† *Stat.* 5. Secondly. As to BREAD, it is enacted, by 31 Geo. 2. c. 29. par. 2. "That the court, or persons hereunto authorized to set the affize and weight of bread, and the price for the same shall so do as often as they shall think proper; and that in every affize, respect shall be had, to the price which the grain, meal, or flour, shall bear in the public markets, in or near the place for which such affize shall be set; making reasonable allowance to makers for their charges and profit."

† *Sett.* 6. And it is further enacted by par. 3. "That where an assize shall be set no person shall there sell bread, except wheaten and household, otherwise brown bread, and such other sort as shall be publicly allowed by the court, or persons aforesaid; but where it hath been usual to make bread with the meal of rye, barley, oats, beans, or pease, or with the meal of any such different sorts of grain mixed together, or the court or persons shall allow such bread to be made, such bread shall and may be there made and sold; and offenders on conviction by confession, or the oath of one witness, before any magistrate within his jurisdiction, shall forfeit not exceeding forty nor less than twenty shillings."

An assize set, no other sort of bread (wheaten and household excepted) to be made for sale, under penalty of forfeiting not exceeding 40 s. nor less than 20 s.

† *Sett.* 7. By par. 4. "The assize and weight of the several sorts of bread for sale, and the price shall be set and ascertained according to the following tables mark'd No. 1. and 2."

Assize and price to be according to the tables.

N. B. Part the first, or the assize table, contains the price of the bushel of wheat Winchester measure, from 2 s. 9 d. to 14 s. 6 d. the bushel, the allowance of the magistrates or justices to the baker, for baking being included. So that (for example) if the price of wheat in the market is 5 s. the bushel and the magistrates allow 1 s. 6 d. the bushel to the baker for baking, find 6 s. 6 d. and even therewith will be found the weights of the several loaves; but if the price in the market is 3 s. and the allowance 1 s. then the weight of the loaves will be found even with 4 s.

N. B. Part the second, or the priced table, contains the price of the bushel of wheat, Winchester measure from 2 s. 9 d. to 14 s. 6 d. the bushel the allowance for baking being included; and also the prices of the peck, half peck, and quarters, wheaten and household loaves, so that (for example) if the price of wheat in the market is 5 s. the bushel, and the magistrates allow 1 s. 6 d. for baking, find 6 s. 6 d. and even therewith will be found the prices of the several loaves.

It was thought sufficient to insert the weight of a penny-loaf, as the weight of all other loaves may thereby be easily calculated.

T A B L E N^o. I.
OF BREAD MADE OF WHEAT.

Price of the bush- el of wheat & baking. s. d.	Weight.		Prized Bread.							
	The penny loaf.		Quartern loaf.		Halfpeck loaf.		Peck loaf.			
	Wheaten oz. dr.	Household oz. dr.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.	Wheaten s. d.	Household s. d.
2 9	23 4	19 4	0 3 ¹	0 2 ¹	0 6 ¹	0 4 ¹	1 0 ¹	0 9 ¹	1 0 ¹	0 9 ¹
3 0	20 4	17 1	0 3 ¹	0 2 ¹	0 7 ¹	0 5 ¹	1 1 ¹	0 10 ¹	1 1 ¹	0 10 ¹
3 3	18 9	15 4	0 3 ¹	0 2 ¹	0 7 ¹	0 5 ¹	1 3	0 11		
3 6	17 6	23 3	0 4	0 3	0 8	0 6	1 4	1 0		
3 9	16 6	21 6	0 4 ¹	0 3 ¹	0 8 ¹	0 6 ¹	1 5	1 1		
4 0	15 4	20 4	0 4 ¹	0 3 ¹	0 9	0 6	1 6	1 1 ¹		
4 3	14 4	19 1	0 4 ¹	0 3 ¹	0 9 ¹	0 7 ¹	1 7 ¹	1 2 ¹		
4 6	13 9	17 15	0 5	0 3 ¹	0 10 ¹	0 7 ¹	1 8 ¹	1 3 ¹		
4 9	12 12	17 1	0 5 ¹	0 4	0 10 ¹	0 8	1 9 ¹	1 4 ¹		
5 0	12 1	16 6	0 5 ¹	0 4 ¹	0 11 ¹	0 8 ¹	1 11	1 5		
5 3	11 9	15 7	0 6	0 4 ¹	1 0	0 9	2 0	1 6		
5 6	11 2	14 10	0 6 ¹	0 4 ¹	1 0 ¹	0 9	2 1	1 7		
5 9	10 8	14 4	0 6 ¹	0 5	1 1 ¹	0 9	2 2 ¹	1 7 ¹		
6 0	10 2	13 9	0 7	0 5 ¹	1 1 ¹	0 10	2 3 ¹	1 8 ¹		
6 3	9 11	13 1	0 7 ¹	0 5 ¹	1 1 ¹	0 10	2 4 ¹	1 9 ¹		
6 6	9 4	12 10	0 7 ¹	0 5 ¹	1 3	0 11	2 6	1 10		
6 9	9 0	12 1	0 7 ¹	0 5 ¹	1 3 ¹	0 11 ¹	2 7	1 11		
7 0	8 11	11 9	0 8	0 6	1 4	1 0	2 8	2 0		
7 3	8 7	11 2	0 8 ¹	0 6 ¹	1 4 ¹	1 0	2 9	2 1		
7 6	8 3	10 11	0 8 ¹	0 6 ¹	1 5 ¹	1 1	2 10	2 2		
7 9	7 14	10 6	0 8 ¹	0 6 ¹	1 5	1 1 ¹	2 11 ¹	2 2 ¹		
8 0	7 10	10 2	0 9 ¹	0 6 ¹	1 6 ¹	1 1 ¹	3 0 ¹	2 3 ¹		
8 3	7 5	9 15	0 9 ¹	0 7	1 7	1 2	3 2	2 4		
8 6	7 2	9 9	0 9 ¹	0 7 ¹	1 7 ¹	1 2 ¹	3 3	2 5		
8 9	6 15	9 4	0 10	0 7 ¹	1 8	1 3	3 4	2 6		
9 0	6 13	8 15	0 10 ¹	0 7 ¹	1 8 ¹	1 3 ¹	3 5	2 7		
9 3	6 9	8 12	0 10 ¹	0 8	1 9	1 3 ¹	3 6 ¹	2 7 ¹		
9 6	6 7	8 8	0 10 ¹	0 8 ¹	1 9 ¹	1 4 ¹	3 7 ¹	2 8 ¹		
9 9	6 4	8 5	0 11	0 8 ¹	1 10	1 4 ¹	3 8 ¹	2 9 ¹		
10 0	6 1	8 2	0 11 ¹	0 8 ¹	1 11 ¹	1 5	3 10	2 10		
10 3	5 15	7 15	0 11 ¹	0 8 ¹	1 11 ¹	1 5 ¹	3 11	2 11		
10 6	5 13	7 12	1 0	0 9	2 0	1 6	4 0	3 0		
10 9	5 11	7 9	1 0 ¹	0 9	2 0 ¹	1 6 ¹	4 1	3 1		
11 0	5 9	7 5	1 0 ¹	0 9 ¹	2 1	1 7	4 2	3 2		
11 3	5 6	7 3	1 0 ¹	0 9 ¹	2 1 ¹	1 7	4 3	3 3		
11 6	5 3	7 1	1 1	0 10	3 2	1 7	4 4	3 3 ¹		

Price

Price of the bush- el of wheat & baking.	Weight.		Prized Bread.							
	The Penny loaf.		Quartern loaf.		Half peck.		Peck loaf.			
	Wheaten	Household	Wheaten	Household	Wheaten	Household	Wheaten	Household	Wheaten	Household
s. d.	os. dr.	os. dr.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
11 9	5 2	6 15	1 1 $\frac{1}{2}$	0 10	2 3	1 8	4 5	3 4		
12 0	5 1	6 13	1 1 $\frac{1}{2}$	0 10 $\frac{1}{2}$	2 3 $\frac{1}{2}$	1 8 $\frac{1}{2}$	4 7	3 5		
12 3	4 15	6 10	1 2	0 10 $\frac{1}{2}$	2 4	1 9	4 8	3 6		
12 6	4 14	6 8	1 2 $\frac{1}{2}$	0 10 $\frac{1}{2}$	2 4 $\frac{1}{2}$	1 9 $\frac{1}{2}$	4 9	3 7		
12 9	4 13	6 5	1 2 $\frac{1}{2}$	0 11	2 5	1 10	4 10	3 8		
13 0	4 11	6 4	1 3	0 11 $\frac{1}{2}$	2 5 $\frac{1}{2}$	1 10 $\frac{1}{2}$	4 11 $\frac{1}{2}$	3 8 $\frac{1}{2}$		
13 3	4 9	6 3	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 6 $\frac{1}{2}$	1 10 $\frac{1}{2}$	5 1	3 9		
13 6	4 8	6 1	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7	1 11	5 2	3 0		
13 9	4 7	5 15	1 3 $\frac{1}{2}$	0 11 $\frac{1}{2}$	2 7 $\frac{1}{2}$	1 11 $\frac{1}{2}$	5 3	3 12		
14 0	4 5	5 13	1 4	1 0	2 8	2 0	5 4	4 0		
14 3	4 4	5 11	1 4 $\frac{1}{2}$	1 0 $\frac{1}{2}$	2 8 $\frac{1}{2}$	2 0 $\frac{1}{2}$	5 5	4 1		
14 6	4 3	5 9	1 5	1 0 $\frac{1}{2}$	2 9	2 1	5 6	4 2		

Note, The wheaten loaves are three-fourths of the weight of the household loaves; and if the magistrates or justices shall think fit to allow of any white loaves of the price of one penny or two pence, they are to weigh at all times three-fourths of the weight of the wheaten loaves of the same price.

Note, The prices of the household loaves are always three-fourths of the prices of the wheaten loaves; and where it shall be thought proper to allow of half quartern loaves, the prices of such loaves (if sold singly) are to be half a farthing higher than is allowed by this table, when it shall so happen that the farthing is split.

And magistrates and justices within their respective jurisdictions being to set the assize and fix the price of the several loaves of bread having respect to the price which the grain, meal or flour shall bear in the markets. But no provision being made, how they should know what price the respective sorts of meal and flour should be esteemed to bear in proportion to the price of wheat they are therefore to take notice that the peck loaf of each sort of bread is to weigh, when well baked, 17 lb. 6 oz. avoirdupois, and the rest in proportion; and every sack of meal or flour is to weigh 2 cwt. 2 qrs. net; from every sack of meal or flour there ought to be produced, on the average, 20 such peck loaves of bread; and, by observing the said rule, magistrates and justices may at all times know if the baker hath more or less than the allowance they intend to give him.

T A B L E II.

OF BREAD MADE OF SEVERAL GRAINS.

The first column contains the prices of the bushel of Grain, baking included : which prices are adapted so as to serve either for the Winchester bushel of rye, of barley, of oats, of beans, of maslin *alias* miscellany, consisting of two-thirds wheat and one third rye ; the price of either of which bushels in the market being known, the magistrates are to add the intended allowance thereto ; the amount of which being found in column No. I. the weight which the several loaves ought to be of, will be found under column No. II. and the price of the respective peck loaves (which are to weigh 17 lb. 6 oz. each) under No. I.

Note. Where bread is allowed at any time to be made for sale of pease only, the assize and price thereof are to be set and fixed from the bean columns ; and where bread is ordered to be made for sale of a coarse sort of maslin or miscellany grain, consisting of one-third rye, one-third barley, and one-third either pease or beans, the assize and price thereof are to be set and fixed from the barley columns.

Note also, That this table is framed for bread to be made of the whole produce of the said several grains, except the bran or hull thereof only.

No. 1.										No. 2.										No. 3.												
Price of the bushel and bak- ing.										Weight of the penny loaf.										Price of the peck loaf.												
s. d.		oz. dr.		oz. dr.		oz. dr.		oz. dr.		oz. dr.		s. d.		oz. dr.		oz. dr.		oz. dr.		s. d.		oz. dr.		oz. dr.		s. d.		oz. dr.		oz. dr.		
1	0	2	8	07	8	31	4	83	12	70	0	0	4	0	4	0	9	0	3	0	4	0	4	0	3	0	4	0	3	0	4	
1	3	0	0	54	0	25	0	67	0	56	0	0	5	0	5	0	11	0	4	0	5	0	4	0	5	0	5	0	5	0	6	
1	6	11	10	45	0	24	14	55	12	46	10	0	6	0	6	0	1	1	0	5	0	5	0	6	0	6	0	6	0	6	0	7
1	9	15	11	38	9	17	14	47	14	40	0	0	7	0	7	0	1	3	0	5	0	7	0	7	0	7	0	7	0	7	0	8
2	0	31	4	33	12	15	10	41	14	35	0	0	8	0	8	0	1	5	0	6	0	8	0	8	0	8	0	8	0	8	0	9
2	3	27	13	30	0	13	14	37	4	31	2	0	10	0	9	0	1	7	0	7	0	9	0	9	0	9	0	9	0	9	0	10
2	6	25	0	27	0	12	8	33	8	28	0	0	11	0	10	0	1	10	0	8	0	10	0	10	0	10	0	10	0	10	0	11
2	9	22	11	24	9	11	6	30	7	25	6	1	0	0	11	2	1	0	9	0	9	0	11	0	11	0	11	0	11	0	12	
3	0	20	13	22	8	10	7	27	14	23	5	1	1	0	12	2	2	0	10	0	10	0	12	0	12	0	12	0	12	0	13	
3	3	19	4	20	12	9	10	25	12	21	8	1	2	1	1	1	2	4	0	10	0	11	0	1	1	1	0	0	0	13	0	14
3	6	17	13	19	4	8	15	23	15	20	0	1	3	1	2	2	6	0	11	0	11	0	1	2	1	0	0	0	0	14	0	15
3	9	16	11	18	0	8	5	22	5	18	10	1	4	1	3	2	8	1	0	11	0	1	3	1	0	0	0	0	0	15	0	16
4	0	15	10	16	14	7	13	20	15	17	8	1	5	1	4	2	11	1	1	1	1	1	1	4	1	0	0	0	0	16	0	17
4	3	14	12	15	14	7	6	19	11	16	8	1	6	1	5	3	0	1	2	1	2	1	1	5	1	0	0	0	0	17	0	18
4	6	13	14	15	0	6	15	18	10	15	9	1	8	1	7	3	2	1	3	1	3	1	1	6	1	0	0	0	0	18	0	19
4	9	13	2	14	4	6	9	17	11	14	12	1	8	1	8	3	5	1	3	1	3	1	1	7	1	0	0	0	0	19	0	20
5	0	12	8	13	8	6	4	16	12	14	0	1	10	1	9	3	8	1	4	1	4	1	1	8	1	0	0	0	0	20	0	21
5	3	11	14	12	14	5	15	15	15	13	5	1	11	1	10	3	11	1	5	1	5	1	1	9	1	0	0	0	0	21	0	22
5	6	11	5	12	4	5	11	15	3	12	11	2	0	1	11	4	1	1	7	1	7	1	1	10	1	0	0	0	0	22	0	23
5	9	10	13	11	12	5	7	14	9	12	2	2	1	2	0	4	3	1	7	1	7	1	1	11	1	0	0	0	0	23	0	24
6	0	10	6	11	4	5	3	13	15	11	10	2	2	2	1	4	5	1	8	2	8	2	0	0	0	0	0	0	0	24	0	25
6	3	10	0	10	13	5	0	13	6	11	3	2	3	2	2	4	7	1	8	2	8	2	1	0	0	0	0	0	0	25	0	26
6	6	9	10	10	6	4	13	12	14	10	12	2	5	2	3	4	9	1	9	2	9	2	2	0	0	0	0	0	0	26	0	27
6	9	9	4	10	0	4	10	12	6	10	6	2	6	2	4	5	0	1	10	2	3	2	3	0	0	0	0	0	0	27	0	28
7	0	8	15	9	10	4	7	11	15	10	0	2	7	2	5	5	1	1	11	2	4	2	4	0	0	0	0	0	0	28	0	29

† *Sett.* 9. And it is farther enacted par. 5. "That every assize shall be set in averdupoize weight, of sixteen ounces to the pound, and not troy weight, and in the several proportions directed by the tables, or as near as may be; and that the said tables shall extend as well to bread made with wheat mixed with other grain, as to bread made with other grains than wheat, publickly licensed to be made into bread; and that the assize of all such mixed bread shall be set and ascertained as near as may be, to the said tables."

Assize to be set in averdupoize weight, directed by the tables.

† *Sett.* 10. And it is further enacted, par. 6. "That the prices which the several kinds of grain, meal, and flour, shall, *bona fide*, sell for in *London*, in open and publick market, shall be certified on oath, on some certain day in every week, as the mayor and aldermen shall appoint, by the meal weighers of *London*, or such persons as the said court shall direct; and shall also on some certain day in every week, to be appointed by the said court, be entered by such persons in writing, and kept at the town clerk's office in the said city: And the next day after every such price shall be so certified, the assize and weight of all sorts of bread to be sold within the limits of their jurisdiction, and the price to be paid for the same, shall be set by the said court of mayor and alderman, if the said court shall then sit, and if not, then by the mayor of the said city; and that the assize so set in *London* shall take place as the said court shall order, and be in force for *London* and the liberties thereof, and the weekly bills of mortality (the city of *Westminster* and liberties thereof, the borough of *Southwark*, and weekly bills of mortality in the county of *Surry* excepted) until another assize in *London* shall be set; and that the assize so set, shall, with all convenient speed be made public in such manner as the said court of mayor and aldermen shall direct: but before any advance or reduction shall in any week be made by the said court or the mayor in the price of bread, the meal weighers or other persons shall leave in writing at the common hall of the company of Bakers in *London*, a copy of every return of the price of grain, meal, and flour, which they shall make, and enter in such book as aforesaid, some time of the same day on which such meal weighers or other persons shall make every such return, and entry; to the intent that the said company of Bakers may the morning of the next day after every such return and entry made, and before any assize shall be set, have an opportunity to offer, to the mayor and aldermen, and if such court shall not then sit, to the mayor, all such objections as the said company of Bakers shall think fit against any advance or reduction being that day made."

Return to be made weekly to the court of aldermen of *London*, of the prices which the grain sell for to be entered in a book in the town clerk's office; the assize to continue till a new assize be set.

The mealweighers are to leave at the Bakers Hall a copy of the returns.

† *Sett.*

The court and magistrates, &c. in other cities, towns, and boroughs, may, cause returns to be made; the prices to be entered and certified; the affize to be set within 2 days after; and to continue (not exceeding 7 days.)

† *Sec. 11.* And it is further enacted, par. 7. "That the court of mayor and aldermen of every other city, and where there shall be no such court, or when the same shall not sit, the chief magistrate of every other city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magistrate, or two justices where there shall be no such mayor, bailiffs, aldermen, or chief magistrates; shall severally and respectively, cause the respective prices which the several sorts of grain, meal, and flour, proper to make bread allowed to be made in every such other city, town corporate, borough, town, or place, shall, *bona fide*, sell for, in the respective publick markets in or near to every such other place, to be certified upon oath, unto such magistrates as aforesaid, in such manner in every week, as any such respective court or magistrates shall appoint; and the price so certified shall be entered by the person who shall certify the same in some book, kept by him for that purpose; and within two days after the affize and weight of bread, shall be set by the persons and in the jurisdictions as aforesaid respectively, the same shall take place on such day in every week, and be in force for such time, not exceeding seven days from the setting of every such affize and shall be made public in such manner, as such magistrates as aforesaid shall within their respective jurisdictions direct."

Two or more justices may set an affize and cause returns to be made.

(a) For the form of the certificate which must be signed with the name of the person who returns it, vide the act, *sect. 11.* And 1 Burn 243.

† *Sec. 12.* And be it further enacted, par. 8. "That if any two justices of counties shall set an affize, it shall be lawful for them to cause the price which grain, meal, and flour, fit to make bread, shall, *bona fide*, sell for in the respective publick corn markets, in or near the place or places respectively, to be certified on oath (a) to them at their respective places or abode, in any such county, on such day in every week as they shall appoint, by the respective clerks of the market, or such other person as any such two justices shall appoint; and that the price of grain, meal, and flour, so returned, shall be entered by the person who shall return the same, in some book kept by him for that purpose; and within two days after the price and affize of bread may be by any two justices set for any time not exceeding fourteen days from every setting thereof; and the affize which shall be so set, shall commence and be in force at such time, and be made publick (b) in such place or places, for which the same shall be so set, as the said justices shall direct."

(b) For the form of the publication, vide the act, *sect. 12.* And 1 Burn 244.

Bakers may see the returns that they may object to the affize.

† *Sec. 13.* And be it further enacted, par. 9. "That any baker shall have liberty, the day after every return shall be made, and entered in the book, to see the entry without paying

“ paying any thing, to the intent that he may have an opportunity on the said next day to offer to any such court, mayor, bailiffs, aldermen, or other chief magistrate or magistrates, or justices, as aforesaid, before any such assize shall be set, such objections as any such baker can reasonably make against any advance or reduction being made.”

† *Stat. 14.* And be it further enacted, par. 9. “ That no maker of bread for sale shall pay any fee or reward for any assize of bread being set, altered, or published.”

Not liable to fees.

† *Stat. 15.* And it is further enacted; par. 11. “ That the half peck and quarter of a peck loaves of wheaten and household bread are to weigh in proportion to the weight a peck loaf of wheaten or household bread ought to weigh, and are to be sold according to the price a peck loaf of wheaten or household bread respectively is to be sold; and whenever any bread shall be ordered to be made with the meal or flour of rye, barley, oats, peas, or beans, either alone, or mixed, the assize of such bread shall be made publick in such manner as the said magistrate, who shall set such assize, shall direct.”

Half peck and quarter loaves to weigh, and be sold, in due proportion to the peck loaf.

† *Stat. 16.* And it is also enacted, par. 13. “ That in places where any sixpenny, twelpenny, and eighteenpenny loaves shall be allowed, no peck, half peck, or quarter of a peck loaves shall be permitted at the same time to be there made or sold, upon pain of any sum not exceeding forty, nor less than twenty shillings.”

Where bread of a certain denomination and value shall be ordered.

† *Stat. 17.* And it is further enacted, par. 14. “ That if the justices of any county or division shall, at sessions, think fit to fix, that any hundred, or other place in such county or division, ought to be considered as in any one particular hundred, riding, or division, of such county, riding, or division, in order that the assize of bread for such particular hundred or place may extend to or comprize such other hundred or place it shall be lawful for them so to do; but by so doing, no justice shall be excluded from acting as a justice in any hundred, riding, or division of any such county in which any such particular towns, districts, or places shall lie, or the assize for them shall be set.”

Sessions may fix the jurisdiction of any place within a certain district.

† *Stat. 18.* And it is likewise enacted, par. 15. “ That an entry shall be made by every clerk of the market, or other person, of every return, and of the rate at which the price, assize, and weight of bread shall be set or fixed within the jurisdiction

Entry to be made by every clerk of the market, &c.

"jurisdiction of every such clerk of the market, or other persons, which any inhabitant shall inspect without fee."

No alteration unless price of grain, shall vary 3 d. in the bushel from the last return.

† *Sec. 19.* And be it also enacted, par. 16. "That after an assize shall be set, no alteration shall be made therein in any subsequent week, either to rise the same higher, or to sink the same lower, unless the price of wheat, or other grain, shall be returned as having rose three pence each bushel, more than the last return made, or having fallen three pence each bushel lower than the said last return; no provision being made by the said assize tables for altering any assize upon such an event."

Forfeiture of any meal weigher, clerk, &c. who shall neglect his duty, and any peace officer, who shall disobey.

† *Sec. 20.* And it is likewise enacted, par. 17. "That if any person appointed to certify or return the price of grain, meal, and flour, shall neglect any matters required to be done by him, or shall designedly make any false certificate or return; or if any peace-officer shall neglect to obey any warrant in writing delivered to him under the hand and seal of any magistrate, or to do any other act requisite to be done by him, shall forfeit not exceeding five pounds, nor less than twenty shillings."

Penalty for refusing to disclose the true prices of grain, meal, and flour, or for giving in a false or collusive price.

† *Sec. 21.* And it is further enacted, par. 18. "That in case any dealers in corn, grain, meal, or flour, on reasonable request by the meal weighers of London, or by the clerks of the markets, or other persons, appointed to give in and certify the prices of grain, meal, and flour, shall refuse to make known the true real prices the several sorts of grain, meal, and flour, shall be *bona fide* bought at, or sold, by or for him, her, or them respectively, at any corn market, within the jurisdiction of any such persons aforesaid, or shall knowingly give in any false or untrue price of any grain, meal, or flour, bought or sold, or agreed so to be, or any price which hath been made by any deceitful means, on being convicted by the oath of one witness, or solemn affirmation, or on confession, shall forfeit not exceeding ten pounds, nor less than forty shillings."

What shall be done where any false return shall be suspected.

† *Sec. 22.* And it is further enacted, par. 19. "That if any such court, magistrate, or justices, as aforesaid, who shall have ordered any return, shall, within three days after such return made, suspect that the same was not truly and *bona fide* made, it shall be lawful to summon before them respectively, any person who shall have bought or sold, or ~~shall~~ be suspected to have bought or sold, or agreed to buy or sell, any grain, meal, or flour, or who shall be thought to be likely to give any information concerning the premises, and to examine them respectively upon their several oaths, touching the rates and prices the several sorts of grain,

“ grain, meal, and flour, or any of them, were there really
 “ and *bona fide* bought at, or sold for, or agreed so to be by
 “ him, her, or them, respectively, at any time within seven
 “ days preceding the summoning: and if any person so sum-
 “ moned shall neglect to appear, (and proof be made on oath
 “ of such summons having been duly served) or if any person
 “ so summoned shall appear, and neglect or refuse to answer
 “ lawful questions, on being convicted by the oath of one
 “ witness, or confession, before any such court, magistrate,
 “ or justices, shall forfeit not exceeding ten pounds, and not
 “ less than forty shillings: and if any person, so examined on
 “ oath, shall forswear himself, such person shall be liable to
 “ be prosecuted as for perjury, by indictment or information,
 “ provided that the party so summoned be not obliged to travel
 “ above five miles from the place of his abode.”

Party not oblig-
 ed to travel
 above 5 miles.

† *Stat.* 23. And it is further enacted, par. 20. “ When-
 “ ever any court, as aforesaid, magistrate, or justices, shall
 “ order any bread to be made with the meal of any other
 “ grain than wheat, or to be mixed with wheat, or to be made
 “ with the meal of any other sort of grain, either separate or
 “ mixed together, all persons shall make bread for sale with
 “ such mixed meal, or of such weight and goodness, and shall
 “ sell the same at such prices, as such court, magistrates, or
 “ justices, shall direct, upon pain of any sum not exceeding
 “ five pounds, nor less than forty shillings.”

Bakers to make
 the bread of
 such weight
 goodness, and
 price, as shall
 be directed.

† *Stat.* 24. And it is further enacted, par. 21. “ That the
 “ several sorts of bread shall be well made, according to the
 “ goodness of the several sorts of meal, whereof the same ought
 “ to be made, and that no allum, or any mixture or ingredi-
 “ ent whatsoever (except only the genuine meal, common
 “ salt, pure water, eggs, milk, yeast, and barm, or such leaven
 “ as shall be allowed by the court, or person who shall have
 “ set an assize of bread where any such leaven shall be used,
 “ and where no such assize shall have been set, then such
 “ leaven as any magistrate or justice shall allow, shall be used
 “ in making dough, or any bread to be sold, upon pain that
 “ every person (other than a servant or journeyman) who shall
 “ knowingly offend, and be convicted by confession, or by
 “ oath of one witness, before any such magistrate or justice,
 “ shall forfeit not exceeding ten pounds, and not less than
 “ forty shillings, or shall be committed to the house of cor-
 “ rection, or some prison of the county or place where the of-
 “ fence shall be, to hard labour, not exceeding one calendar
 “ month, nor less than ten days. And if any servant shall of-
 “ fend, he shall forfeit, not exceeding five pounds, and not less
 “ than twenty shillings, or be apprehended and committed as
 “ aforesaid; and it shall be lawful for the magistrate or justice,
 “ before

No adultera-
 tion or mix-
 ture, except the
 genuine meal or
 flour, salt, wa-
 ter, eggs, milk,
 yeast, and barm,
 or such leaven
 as shall be occa-
 sionally allowed.

“ before whom any such offender shall be convicted, out of the
 “ money forfeited, to cause the offender's name, place of
 “ abode, and offence, to be published in some newspaper,
 “ which shall be printed or published in or near the county,
 “ city, or place, where any such offence shall have been
 “ committed.”

The penalty of
 adulterating
 corn, meal, or
 flour.

† *Sec. 25.* And it is further enacted, par. 22. “ That no
 “ person shall put into any corn, meal, or flour, ground,
 “ dressed, bolted, or manufactured for sale, any mixture or
 “ thing whatsoever, or shall knowingly sell, offer, or expose
 “ to or for sale, any meal of one sort of grain as or for the
 “ meal of any other sort of grain, or any thing as or for, or
 “ mixed with, the meal of any grain, which shall not be the
 “ real and genuine meal of the grain the same shall import to
 “ be, upon pain of forfeiting any sum not exceeding five
 “ pounds, nor less than forty shillings.”

Penalty where
 bread shall be of
 a different mix-
 ture of corn than
 what it impor-
 teth to be of, or
 is allowed.

† *Sec. 26.* And it is further enacted, par. 23. “ That no
 “ person shall put into any bread made for sale, any mixture
 “ of meal of any other sort of grain than of the grain the
 “ same shall import to be, and allowed to be made of, or any
 “ larger or other proportion of any other or different sort of
 “ grain, or the meal thereof, than what shall be allowed, or
 “ any mixture or thing in lieu of flour, which shall not real-
 “ ly be the genuine flour the same shall import and ought to
 “ be, upon pain of forfeiting not exceeding five pounds, nor
 “ less than twenty shillings.”

Penalty for mak-
 ing bread under
 weight, &c.

† *Sec. 27.* And it is further enacted, par. 24. “ That if
 “ any person shall make, send out, sell, or expose to or for
 “ sale, any bread deficient in weight, he shall forfeit not ex-
 “ ceeding five shillings, nor less than one shilling, for every
 “ ounce deficient; and for every loaf found wanting less than
 “ an ounce not exceeding two shillings and sixpence, nor less
 “ than sixpence, so as such bread which shall be complained
 “ of for wanting weight in any city, town-corporate, bo-
 “ rough, liberty, or franchise having jurisdiction thereof, or
 “ within the bills of mortality shall be brought before some
 “ magistrate, and weighed, within twenty-four hours after,
 “ and so as such bread which shall be so complained of as
 “ in any hundred, riding, division, liberty, rape, wapen-
 “ take, or place, shall be brought before some justice of such
 “ place, and weighed within three days after, unless such de-
 “ ficiency wholly arose from some accident, or was occasioned
 “ by some contrivance or confederacy.”

All bread to be
 fairly marked.

† *Sec. 28.* And it is further enacted, par. 25. “ That
 “ every baker shall cause to be fairly marked on every loaf of
 “ wheaten bread a large Roman W. and upon every loaf of
 “ household or brown bread a large Roman H. so as the same
 “ may

" may, on the view thereof, be ascertained under what denomination of bread every such loaf was made, (except such loaves which shall be raised by the desire of any person who shall order the same, on pain of forfeiting not exceeding twenty, nor less than five shillings."

† Sect. 29. And it is further enacted, par. 26. " That no person shall take for any bread a higher price than shall be ascertained by the court, magistrate, or justices, authorised to set the price and assize, nor refuse to sell any, to any person who shall tender ready money for the same, at the price such bread, by the assize, shall be fixed at, when he shall have any such bread in his house or possession, to be sold, more than shall be requisite for the immediate necessary use of his own family or customers; and it shall be incumbent on such baker to prove the contrary, upon pain of forfeiting not exceeding forty, nor less than ten shillings."

Bakers taking a higher price or refusing to sell.

† Sect. 30. And it is hereby likewise enacted, par. 26. " That if any person shall offer to sale any bread of an inferior quality to wheaten bread, at a higher price than household bread shall be set at by the assize, he shall forfeit, by confession, or the oath of one witness, twenty shillings."

Bread inferior to wheaten not to be higher than household.

† Sect. 31. It is further enacted by par. 27. and by 32 Geo. 2. c. 18. s. 2. " That any magistrate or justice, and also any peace officer, authorised by warrant or any such magistrate in the day-time, may enter into any house, shop, stall, bakehouse, warehouse, or out-house, of or belonging to any baker, or seller of bread, to search for, view, weigh, and try, all or any the bread which shall be there found: and if any bread, or any such search, shall be found to be wanting, either in the goodness of the stuff whereof the same shall be made, or to be deficient in the due baking or working thereof, or shall be wanting in the due weight, or shall not be truly marked according to the directions of this act, or shall be of any other sort of bread than shall be allowed to be made by virtue of this act; any such magistrate or peace officer may seize the same, and dispose thereof as he shall think fit."

The houses, shops, &c. of bakers may be searched, and the bread weighed.

† Sect. 32. And it is further enacted, par. 28. " That if information shall be given on oath to any magistrate or justice that there is cause to suspect that any miller who grinds any grain for reward, or any person who doth dress, bolt, or in any wise manufacture any meal or flour for sale, or any maker of bread for sale, doth mix up with, or put into, any meal or flour ground or manufactured for sale, any

Where any miller, mealman, or baker, shall be suspected of adulterating; the magistrate, upon information on oath, may enter the premises him-

sell and search, or may grant a search warrant to some peace officer; and such meal and flour as shall be deemed adulterated, may be seized.

“mixture, ingredient, or thing whatsoever, not the genuine produce of the grain such meal or flour shall import, and ought to be, or whereby the purity of any meal or flour, in the possession of any such miller, mealman, or baker, is or shall be in anywise adulterated; then such magistrate or justice, and also any peace officer, authorized by warrant in the day-time, on information may enter into any house, mill, shop, bakehouse, stall, bolting house, pastry, warehouse, or out-house, of or belonging to any such miller, mealman, or baker, and to search and examine; and if on any such search it shall appear that any offence hath been committed, contrary to this act; then any magistrate, justice, or officer authorized as aforesaid respectively, may seize and take any meal or flour which shall be deemed, on any such search, to have been adulterated, and all mixtures and ingredients which shall be found and deemed to have been used, or intended to be used, in or for any such adulteration; and such thereof as shall be seized by any peace officer or officers authorized as aforesaid, shall be carried to some magistrate or justice; and if any magistrate or justice, who shall make any seizure in pursuance of this act, or to whom any thing seized under the authority of this act shall be brought, shall adjudge that any mixture or ingredients, not the genuine produce of the grain which such meal or flour so seized, shall import and ought to be, shall have been put into any such meal or flour, or that the purity of any such meal or flour so seized, was adulterated by any mixture or ingredient put therein; then, every such magistrate or justice, is hereby required to dispose of the same as he shall think proper.”

And the miller, mealman, baker, or seller of bread, in whose house, mill, shop, bake-house, stall, bolting-house, pastry, warehouse, out-house, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there, with an intent to have adulterated the purity of meal, flour, or bread, shall, on being convicted by confession, or the oath of one witness, forfeit not exceeding ten pounds, nor less than forty shillings;—unless that such mixture or ingredients was or were not brought or lodged with any design or intent to have been put into any meal or flour, or to have adulterated therewith the purity of any meal or flour, but that the same was in the place for some other lawful purpose.”

† *Sec. 33.* And it is further enacted, par. 29. “That every miller, mealman, baker, or seller of bread as aforesaid, in whose house, mill, shop, bake-house, stall, bolting-house, pastry, warehouse, out-house, or possession, any mixture or ingredient shall be found, which shall be adjudged by any magistrate or justice to have been lodged there, with an intent to have adulterated the purity of meal, flour, or bread, shall, on being convicted by confession, or the oath of one witness, forfeit not exceeding ten pounds, nor less than forty shillings;—unless that such mixture or ingredients was or were not brought or lodged with any design or intent to have been put into any meal or flour, or to have adulterated therewith the purity of any meal or flour, but that the same was in the place for some other lawful purpose.”

Exception.

“And the magistrate out of the money forfeited, may cause the offender's name, place of abode, and offence, to be published, in some news paper in or near the county, city

“or”

“or place, where any such offence shall have been committed.”

† *Secl.* 34. And it is further enacted, par. 30. “That if any person shall wilfully obstruct any search or seizure, or shall oppose any such search being made, or the carrying away any such ingredients as aforesaid, or any bread which shall be seized, as not being made pursuant to this act, he shall forfeit not exceeding five pounds, nor less than twenty shillings.”

Obstructing any search or seizure.

† *Secl.* 35. Provided always, par. 31. “That no miller, mealman, or baker, shall act as a magistrate, or justice of the peace, under this act, on pain of fifty pounds to any person who will sue for the same, by action of debt, &c. at Westminster, or by summary complaint before the court of Session in Scotland.”

No miller, mealman, or baker, to act as a magistrate.

† *Secl.* 36. Provided also, par. 32. “That if any baker shall make complaint to any magistrate by the oath of one witness that any offence shall have been occasioned through the wilful neglect of any servant, then such magistrate may issue his warrant for bringing such servant before any such magistrate, or any magistrate or justice of the county or place where the offender can be found, and examine into the complaint; and, on proof thereof upon oath, by any order under his hand, may adjudge what sum shall be paid by such servant to his master or mistress, by way of recompence for the money he or she shall have paid by reason of the wilful neglect of any such servant; and if any such servant shall neglect on his conviction to make immediate payment, he shall be committed to the house of correction, or some other prison of the county or place in which any such servant shall be apprehended or convicted, to be there kept to hard labour not exceeding one calendar month, unless payment shall be made before the expiration of the said term.”

Where the penalty was occasioned by the journeyman or servant, a recompence to be paid to the master.

† *Secl.* 37. And it is further enacted, by par. 33. “That the mayor of London, or any alderman within the liberties thereof, and any other justice, or any one of them, within their respective jurisdictions, may hear and determine, in a summary way, all offences against this act; and summon any offender; and in case the party shall not appear or offer some reasonable excuse for his default, then upon oath by one witness of any offence committed contrary to this act, any such magistrate shall issue his warrant for apprehending the offender; and upon the appearance, or in case he shall not appear, on notice being left at his usual place of abode, or if he cannot be apprehended, then such ma-

Offences heard and determined in a summary way, and offenders may be summoned.

“ magistrate is authorised to proceed to make inquiry touching the matters complained of, and to examine any witnesses who shall be offered on either side, on oath, as aforesaid, and shall convict or acquit the party accused; and if the penalty, on any such conviction, shall not be paid within twenty-four hours after, every such magistrate shall thereupon issue a warrant, directed to any peace officer within their respective jurisdictions, to make distress; and if any offender shall convey away his goods, or so much thereof that the penalty cannot be levied, then some magistrate within whose jurisdiction the offender shall have removed his goods, shall back the warrant, for levying the distress; and if within five days from the distress being taken, the money forfeited shall not be paid, the goods seized shall be appraised and sold, and for want of such distress, then every such magistrate, on the application of any prosecutor, and proof made of the conviction and non-payment of the penalty and charges, by warrant under his hand and seal, shall commit every such offender to the common gaol or house of correction of the city or place where such offender or offenders shall be found, for one calendar month, unless payment shall be made of the said penalty, costs and charges, before the expiration of the said one calendar month.— And all such penalties and forfeitures, when recovered, shall be paid to the informer.”

+ *Sect. 38.* But by 32 Geo. 2. c. 18. the generality of this application of the forfeiture to informers is restrained, and it is enacted, “ That the penalties not particularly disposed of by 31 Geo. 2. c. 29. where the conviction is by confession or the oath of one witness, shall be, *one moiety* to the informer; and the other moiety, together with all penalties incurred on the weighing, trying, or seizing of any bread by any magistrate or justice shall be applied for the better carrying the said act into execution, as such magistrate or justice shall think fit.”

Power to summon material evidences.

+ *Sect. 39.* And it is further enacted, par. 34. “ That if it shall be made out by the oath of any credible person, that any one is likely to give material evidence on behalf of the prosecutor or the person accused, and will not voluntarily appear before such magistrate to be examined, every such magistrate is authorised to summons every such witness; and if any person so summoned shall neglect to appear, and no just excuse shall be offered, then (after proof by oath of such summons having been duly served) every such magistrate is authorised to issue his warrant under his hand and seal, to bring and examine upon oath every such witness: and if on his appearance he shall refuse to be examined,

Witnesses to be examined on oath.

"examined on oath concerning the premises, without offering any just excuse, any such magistrate may, by warrant, commit any person so refusing to the public prison of the county or place in which he shall be, there to remain not exceeding fourteen, nor less than three days."

† *Secl. 40.* And it is further enacted, par. 37. "That no *certiorari*, letters of advocacy, or of suspension shall be granted to remove any conviction, or other proceedings had thereon in pursuance of this act." No *certiorari*, &c.

† *Secl. 41.* Provided, par. 38. "That if any person shall think himself aggrieved, he shall have liberty to appeal to the next general or quarter sessions for the county or place, upon entering into a recognizance at the time of conviction, with two sufficient sureties, in double the sum which he shall have been adjudged to pay, upon condition to prosecute such appeal with effect, and to be forthcoming to abide the judgment and determination of said next general or general quarter sessions, who shall finally determine the matter of every such appeal, and award costs to be paid by either party: and if the judgment shall be affirmed, such appellant shall immediately pay down the sum he shall have been adjudged to forfeit, with such costs as the sessions shall award to the prosecutor or informer, for the expences sustained by such appeal; and in default of paying the same, any two such justices, or any one magistrate or justice of the peace, having jurisdiction in the place into which any such appellant shall escape, or where he shall reside, shall commit every such appellant to the common gaol of the county or place where he shall be apprehended, until he shall make payment; but if the appellant make good his appeal, costs shall be awarded to the appellant against such informer, and which costs may be recovered by the appellant against any such informer, in like manner as costs given at any general or general quarter sessions of the peace are recoverable." Persons aggrieved may appeal to the next sessions. Appellant is to enter into recognizance, to hear and determine the matter, and award costs.

† *Secl. 42.* Provided, par. 39. "That if any such conviction shall be made within six days before any general or general quarter sessions for the county or place where such conviction shall have been made, then the party aggrieved shall, on entering into a recognizance as before directed, appeal either to the then next or the next following sessions." Appeal to the sessions following.

† *Secl. 43.* And it is further enacted, par. 40. "That every action or suit brought against any magistrate or any peace officer, Limitation of actions.

While the reasons for extending the protection of this statute, to persons acting under the present act. *1 Burn's Justice, p. 256.*

Officer may make tender of amends.

“ officer, for any thing done under this act, shall be commenced within six months next after the fact committed, and shall be laid in the county, city, or place, where the matter shall arise; and that the 24 Geo. 2. c. 44. so far as relates to the rendering the justices more safe in the execution of their office, shall extend to the magistrate acting under this act; and that no action or suit shall be had; nor any writ sued out, or copy of any writ be served upon, any peace officer, until seven days after notice in writing, given to or left for him at his place of abode, by the attorney for the party intending to commence such action; which notice shall contain the name and place of abode of the person intending to bring such action, and also of his attorney, and likewise the cause of action or complaint: And any peace officer may, at any time within seven days after any such notice, tender, or cause to be tendered, any sum of money, as amends for the injury complained of, to the party complaining, or to the attorney named in any such notice; and, if not accepted, the defendant may plead such tender in bar, together with the general issue, or any other plea, with leave of the court in which the action shall be commenced; and if, upon issue joined on such tender, the jury shall find the amends tendered to have been sufficient, they shall find a verdict for the defendant; and in such case, or if the plaintiff become nonsuit, discontinue, or judgment shall be given for the defendant upon demurrer, or if any action or suit shall be brought after the time limited, or shall be brought in any other place than as aforesaid, then the jury shall find for the defendant, and he shall be intitled to costs: But if the jury shall find that no such tender was made, or not sufficient, or against the defendant, they shall give the plaintiff such damages as they shall think proper; and the plaintiff shall recover costs.”

Person may plead the general issue, and give this act, and the special matter in evidence, and if a verdict shall be recorded for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action, after the defendant shall have appeared; or if judgment shall be given, upon a verdict or demurrer, against the plaintiff, the defendant shall recover treble costs.

† And it is further enacted, “ That the defendant may plead the general issue, and give this act, and the special matter in evidence; and if a verdict shall be recorded for the defendant, or if the plaintiff shall be nonsuited, or discontinue his action, after the defendant shall have appeared; or if judgment shall be given, upon a verdict or demurrer, against the plaintiff, the defendant shall recover treble costs.”

Prosecution in 3 days.

† Sect. 44. Provided, par. 41. “ That no person shall be convicted, for any of the before-mentioned offences, unless the prosecution be commenced within three days next after the offence committed.”

† Sect.

† *Stat.* 45. "This act shall not extend to prejudice any right or custom of the city of London, or the practice there used, or any right or custom of any lord or lords of any leet, to set, inquire, and punish, the breach of assize of bread, or the right of any clerk of the market."

General reservation of rights.

† *Stat.* 46. "Nor to prejudice the ancient right or custom of the dean of Westminster, or the high steward of Westminster, and the liberties thereof, to set, ascertain, and appoint the assize and weight of all sorts of bread; but they may respectively set, ascertain, and appoint, according to the meaning of this act, the assize and weight of all sorts of bread which shall be made, sold, or exposed to sale, in Westminster, and the liberties thereof; and shall and may inquire and punish the breach of every such assize and weight of bread, as fully and freely in all respects, as they, or any of them have heretofore been accustomed to."

Reservation of rights of Westminster, to set an assize of bread, within the city and liberty.

† *Stat.* 47. "Nor to prejudice the right of Oxford or Cambridge, or of their clerks of the market, to set the assize and weight of all sorts of bread, &c."

Oxford and Cambridge, to set an assize.

† *Stat.* 48. But the provisions of the foregoing statute of 31 Geo. 2. c. 29. being found defective, when an assize of bread is not set, it is accordingly enacted by 3 Geo. 3. c. 11. par. 1 "That although no assize of bread shall be set in pursuance of the said act, no loaf called or deemed assize loaf in the tables of the assize and price of bread in the said act referred to, shall be made for sale, in any place where any loaf of the bread called or deemed prized loaf, in the said tables of the assize and price of bread, that is to say, no assize loaves of the price of three-pence, and prized loaves called half quartern loaves, nor assize loaves of the price of six-pence, and prized loaves called quartern loaves, nor assize loaves of the price of twelve-pence, and prized loaves called half peck loaves, nor assize loaves of the price of eighteen pence, and prized loaves called peck loaves, shall, at the same time, in any place be made for sale, sold, or carried out for sale, or be offered or exposed to or for sale, or allowed to be sold; on pain of forfeiting not exceeding forty, nor less than ten shillings."

No assize and prized loaf to be made at the same place.

† *Stat.* 49. And it is further enacted, par. 2. "That the justices at any general or quarter session, or at any petty session, shall appoint which of the sorts of assize or prized loaves shall be allowed to be made and sold; and also what other sorts of bread, and grain, shall be allowed to be made and sold within their respective jurisdictions, or any part thereof; and every order which shall be so made, shall be entered in a book provided for that purpose, and in-

Quarter or petty session may appoint the sorts of assize or prized loaves, and what other bread shall be made.

A copy to be published.

Sorts of assize bread of wheat to be allowed.

Proportion as to weight, between the white and wheaten bread, and the wheaten and household assize bread.

The price in the peck loaf, and half peck, and in other subdivisions, in the wheaten, and in household bread.

The weight of the peck loaf, and its subdivisions, in every sort of bread, the same to be weighed both in price, and in other places.

“specified by the makers of bread for sale, in the day-time, without fee; and after the making every such order, the justices who shall make the same shall cause a copy to be affixed up in some market or other publick town within the division or place in which such order is to be observed; or else shall cause a copy to be inserted in some public newspaper published in the county or place, or some part thereof in which every such order is to be observed.”

† *Sec.* 50. Provided, par. 3. “That no justices shall allow any sorts of assize bread made of the flour or meal of wheat, other than wheaten and household bread, and loaves of white bread of the price of two-pence, or under.”

† *Sec.* 51. And it is further enacted, par. 4. “That every maker of bread for sale shall observe the proportion between white and wheaten bread, and wheaten and household assize bread, as to weight, as is mentioned in the said assize tables; that is to say, every white loaf of the price of two-pence, or under, shall always weigh three parts in four of the weight of the wheaten loaf of the like price; and every wheaten assize loaf of bread, of whatsoever price the same shall be, shall always weigh three parts in four of the weight of every household assize loaf of bread of the like price; and that every household assize loaf of bread, of whatever price the same shall be, shall always weigh one third part more than every wheaten assize loaf of the like price, on pain of forfeiting not exceeding forty shillings.”

† *Sec.* 52. And it is further enacted, par. 5. “That every peck, half peck, quarter of a peck, and half quarter of a peck loaf, of the meal or flour of wheat, and called wheaten bread, shall always be sold in proportion to each other respectively; as to price; and that every peck, half peck, quarter of a peck, and half quarter of a peck loaf made for sale, of the meal or flour of wheat, and called household bread, shall always be sold in proportion to each other, and for one fourth less in price than the loaf made for sale with the meal or flour of wheat, called wheaten bread, of the same denomination; on pain of forfeiting not exceeding forty, nor less than ten shillings.”

† *Sec.* 53. And it is further enacted, par. 6. “That the several loaves after mentioned, shall weigh in averdupois weight as follows; that is to say, every peck loaf, seventeen pounds six ounces; every half-peck loaf, eight pounds eleven ounces; every quarter of a peck loaf, four pounds five ounces, and one half ounce; and every half quarter of a peck loaf, two pounds two ounces and three quarters; on pain of forfeiting not exceeding five shillings, nor less than

than one shilling for every ounce wanting; and for less than one ounce, not exceeding two shillings and six-pence, nor less than six-pence; so as all such bread in any city, town corporate, borough, liberty, or franchise, or the jurisdiction thereof, or within the weekly bills of mortality, shall be brought before some justice and weighed, within twenty-four hours after the same shall have been baked, or found in any person's custody for sale, and elsewhere, within three days, unless it shall be made out, that such deficiency wholly arose from some unavoidable accident, or was occasioned by some contrivance or confederacy."

within 3 days; unless deficiency be accounted for.

† Sect. 54. And it is further enacted, par. 7. "That no person shall offer to sale any bread of an inferior quality to wheaten bread, at an higher price than household bread, upon pain of forfeiting not exceeding twenty shillings."

Bread inferior to wheaten, not to be sold higher than household.

† Sect. 55. And it is further enacted, par. 8. "That on the said wheaten or household bread shall be imprinted a large Roman (W), and on household a large Roman (H), except loaves rasped by the desire of the person who shall order the same, on penalty of forfeiting not exceeding forty, nor less than ten shillings; unless it wholly arose from some unavoidable accident, or was occasioned by contrivance or confederacy."

A large Roman (W) to be imprinted on all wheaten bread and a large Roman (H) on household.

† Sect. 56. And it is further enacted, par. 9. "That every loaf made of any other grain than wheat, shall be marked with some letter or letters, not more than two, as the general or quarter session, or any petty session shall direct; which order shall be entered in some book which any maker of bread may peruse, without fee; and such justices shall cause a copy to be put up in some publick town within the division, or shall cause a copy thereof to be inserted in some publick newspaper published in the county; and if the justices shall neglect, then the maker of all such bread shall, in every place where no such order shall be made, cause every loaf of such bread to be marked with any two distinct capital letters as he shall think fit, (except loaves rasped by desire) on pain of forfeiting, not exceeding forty nor less than five shillings, for every loaf of such bread which shall not be so marked as herein before is first directed."

Bread made of any other grain than wheat, to be impressed with such letters as the justices shall order.

An entry to be made free for inspection. Where the justices neglect to make such order, the maker is to make every such loaf with a distinct capital letters Penalty.

† Sect. 57. And it is further enacted, by par. 10. "That any justice, or peace officer by warrant of such justice, may enter any place belonging to any baker, to search, view, weigh, examine, and try, all or any bread which shall be there found; and if any bread shall on examination thereof, by any justice, or on the oath of one witness, be found de-

Justices, or peace officers may enter houses, and search, &c.

cient

Penalty of default in the weight of bread may be found.

“sufficient in weight, or not marked, or be deficient in the due baking or working thereof, or be wanting in the goodness of the stuff, or to have been made with any mixture of meal or flour of any other grain than the same shall import to be made with, or to be made with any other proportion of grain, or to be made with any ingredient which ought not to be put therein; or to be made with any thing in lieu of flour; or that any such bread shall be made with any leaven not allowed, Every justice and officer as aforesaid, shall seize such bread, and to dispose thereof to poor persons, unless the default wholly arose from accident, or contrivance or confederacy, upon pain of forfeiting not exceeding five pounds, nor less than twenty shillings.”

Penalty of oppression.

† Sect. 58. And it is further enacted by par. 11. “That if any person shall in any wise oppose any search, view, weighing, trying, or seizing of any bread, he shall forfeit not exceeding forty, nor less than twenty shillings.”

Penalty of non-compliance, or failure to act as a justice.

† Provided, by par. 12. “That no miller, mealman, or baker, shall be allowed to act as a justice under this act, on pain of fifty pounds, to whoever will inform or sue for the same at Westminster, &c. or by way of summary complaint, before the court of Session in Scotland.”

Penalty of default.

† Provided, par. 13. “That if any baker shall make complaint to any justice, by the oath of one witness, that any offence which shall have been occasioned by default of any servant, every such justice may issue his warrant for bringing such servant before any such justice, or any justice of the county or place where the offender can be found, and examine into the matter; and on proof upon oath, is to adjudge and order what sum of money shall be paid to his master or mistress, for the money he or she shall have paid, by reason of the default of such servant; and if such servant shall refuse on his conviction immediate payment, then any such justice may cause every such servant to be committed to the house of correction, or some other prison of the county or place in which he shall be apprehended, to be kept to hard labour, not exceeding one calendar month, unless payment shall be made.”

Section 59.

Section 60.

Section 61.

Section 62.

† Sect. 59. “By the 14, 15, 16. parts of this statute, it is enacted, “That justices shall hear and determine the several offences; and that the penalties and forfeitures shall be recovered, as by the before recited act 31 Geo. 2. c. 29. l. 34. 35. 36. is therein directed.”

Section 63.

† Sect. 60. By par. 17, 18, 19. “No certiorari shall be granted to remove any conviction or other proceedings had thereupon

“thereupon; and the like liberty of appeal is precisely given
“as by 31 Geo. 2. c. 29. f. 37, 38, 39.”

† *Sett.* 61. By par. 20, 21, 22. The same limitation of actions; protection to justices and officers, &c. costs, &c. is enacted in the precise words of 31 Geo. 2. c. 29. f. 40, 41.

† *Sett.* 62. And it is likewise enacted by par. 23. “That
“no person shall be convicted under this act, unless the pro-
“secution be commenced within three days; and that no per-
“son convicted upon this act, shall be subject or liable to be
“prosecuted for the same offence under any other law.”

Limitation of
prosecutions.

† *Sett.* 63. By par. 24. The penalties and forfeitures are to be distributed, as directed by 32 Geo. 2. c. 18. (a) The rights of the universities are saved in the same words as by 31 Geo. 2. c. 29. f. 44, 45.

(a) Antep. 500.

Sett. 64. But as by the foregoing acts of 31 Geo. 2. c. 29. and 3 Geo. 3. c. 11. two sorts of bread, made of wheat only, are allowed to be made for sale, viz. wheaten and household; it is enacted by 13 Geo. 3. c. 62. “That of
“the flour of wheat, which flour, without any mixture or
“division, shall be the whole produce of the grain, the bran
“or hull thereof only excepted, and which shall weigh three-
“fourth parts of the weight of the wheat whereof it shall be
“made, may be at all times made and sold, and shall be cal-
“led A STANDARD WHEATEN BREAD.”

Standard wheat-
en allowed.

Sett. 65. And it is further enacted, par. 2. “That the
“bakers shall mark every loaf thereof with the capital letters
“S. W. and that the same may be sold although no aliize of
“bread be set of the weight, and in the proportions follow-
“ing; that is to say, that every standard wheaten peck loaf
“shall always weigh 17 lb. 6 oz. avoirdupois, every half
“peck loaf 8 lb. 11 oz. and every quartern loaf 4 lb. 5 oz.
“and one half of an ounce avoirdupois; and that every peck
“loaf, half peck loaf, and quartern loaf, shall always be sold,
“as to price, in proportion to each other respectively; and
“that where wheaten and household bread, made as the law
“now directs, shall be sold at the same time, together with
“this standard wheaten bread, they be sold in respect of and
“in proportion to each other, as followeth; that is to say,
“that the same weight of wheaten bread as costs eight
“pence, the same weight of this standard wheaten bread shall
“cost seven pence, and the same weight of household bread
“shall cost sixpence, or seven standard wheaten assized loaves,
“shall weigh equal to eight wheaten assized loaves or to
“six

Weight, price,
and proportions.

“ fix household affized loaves of the same price as year
 “ as may be.”

Standard wheat-
 en not to be
 sold as prized
 loaves, at one
 time.

† *Sec. 66.* And it is hereby further enacted, par. 3.
 “ That the said standard wheaten bread be not sold as prized
 “ loaves, at one and the same time, together with affized
 “ loaves of the same standard wheaten bread.”

Magistrates to
 set the affize.

† *Sec. 67.* And it is further enacted, par. 4. “ That every
 “ magistrate, or others authorised to set the affize and fix the
 “ price of bread, are authorised to set the affize on, or fix
 “ the price of the standard wheaten bread aforesaid, according
 “ to the following table.”

Price of the bushel of wheat and bak- ing.		The Affize Table.														
		Small Bread.						Large Affize Bread.								
		Penny.			Two Pence.			Sixpence.			Twelve pence.			Eighteen Pence.		
s.	d.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	
2	9	25	4	3	2	9	9	7	11	18	15	5	28	7	0	
3	0	23	3	2	14	5	8	12	0	17	6	4	26	1	1	
3	3	21	6	2	10	12	8	0	5	16	0	11	24	1	0	
3	6	19	14	2	7	12	7	7	3	14	14	5	22	15	8	
3	9	18	9	2	5	1	6	15	4	13	14	7	20	13	11	
4	0	17	6	2	2	12	6	8	4	13	0	9	19	8	13	
4	3	16	6	2	0	11	6	2	2	12	4	4	18	6	7	
4	6	15	7	1	14	4	5	12	11	11	9	6	17	6	1	
4	9	14	10	1	13	4	5	7	13	10	15	10	16	7	7	
5	0	13	14	1	11	13	5	3	7	10	6	13	15	10	4	
5	3	13	4	1	10	8	4	15	7	9	14	4	14	14	5	
5	6	12	10	1	9	4	4	11	13	9	7	11	14	3	8	
5	9	12	1	1	8	3	4	8	9	9	1	1	13	9	10	
6	0	11	9	1	7	3	4	5	8	8	11	1	13	0	9	
6	3	11	2	1	6	4	4	2	12	8	5	8	12	8	3	
6	6	10	11	1	5	6	4	0	3	8	0	5	12	0	8	
6	9	10	5	1	4	10	3	13	13	7	11	9	1	9	6	
7	0	9	15	1	3	14	3	11	9	7	7	3	11	2	12	
7	3	9	9	1	3	3	3	9	8	7	3	1	10	12	9	
7	6	9	4	1	2	9	3	7	10	6	15	4	10	6	13	
7	9	9	0	1	1	15	3	5	13	6	11	0	10	1	7	
8	0	8	11	1	1	6	3	4	2	6	8	4	9	12	7	
8	3	8	7	1	0	14	3	2	9	6	5	2	9	7	11	
8	6	8	3	1	0	6	3	1	1	6	2	2	9	3	3	

Price

The Affize Table continued.

Price of the bushel of wheat and ba- king.			Small Breads.						Large Affize Breads.												
			Penny.			Two Pence.			Sixpence.				Twelvepence.				Eighteen Pence.				
			s.	d.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.			
8	9	7	15	0	15	14	2	15	11	5	15	5	8	15	0						
9	0	7	12	0	15	7	2	14	5	5	12	11	8	11	0						
9	3	7	8	0	15	0	2	13	1	5	10	3	8	7	4						
9	6	7	5	0	14	10	2	11	14	5	7	13	8	3	11						
9	9	7	2	0	14	4	2	10	12	5	5	9	8	0	5						
10	0	6	15	0	13	14	2	9	11	5	3	7	7	13	2						
10	3	6	13	0	13	9	2	8	11	5	1	6	7	10	1						
10	6	6	10	0	13	4	2	7	12	4	15	7	7	7	3						
10	9	6	7	0	12	15	2	6	13	4	13	10	7	4	6						
11	0	6	5	0	12	10	2	5	15	4	11	13	7	1	12						
11	3	6	3	0	12	6	2	5	1	4	10	2	6	15	4						
11	6	6	1	0	12	1	2	4	4	4	8	9	6	12	13						
11	9	5	15	0	11	13	2	3	8	4	7	0	6	10	8						
12	0	5	13	0	11	9	2	2	12	4	5	8	6	8	4						
12	3	5	11	0	11	6	2	2	1	4	4	2	6	6	2						
12	6	5	9	0	11	2	2	1	6	4	2	12	6	4	2						
12	9	5	7	0	10	14	2	0	11	4	1	7	6	2	2						
13	0	5	6	0	10	11	2	0	1	4	3	0	6	0	4						
13	3	5	4	0	10	8	1	15	8	3	14	15	5	14	7						
13	6	5	2	0	10	5	1	14	14	3	13	13	5	12	11						
13	9	5	1	0	10	2	1	14	5	3	12	11	5	11	0						
14	0	4	15	0	9	15	1	13	13	3	11	9	5	9	6						
14	3	4	14	0	9	12	1	13	4	3	10	9	5	7	13						
14	6	4	13	0	9	9	1	12	12	3	9	8	5	6	5						

THE PRICE TABLE.

The Price Table.				The price of the bush- el of wheat and baking.	The Price Table.				The price of the bush- el of wheat and baking.
Prized Bread.					Prized Bread.				
Quar- tern Loaf.	HalfPeck Loaf.	Peck Loaf.			Quar- tern Loaf.	Halfpeck Loaf.	Peck Loaf		
s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.	s. d.
0 2	0 5 ¹ ₂	0 11	2 9	0 8	1 5	2 11	8 9	0 2	0 5 ¹ ₂
0 3	0 6	1 0	3 0	0 9	1 6	3 0	9 0	0 3	0 6
0 3 ¹ ₂	0 6 ¹ ₂	1 1	3 3	0 9 ¹ ₂	1 6 ¹ ₂	3 1	9 3	0 3 ¹ ₂	0 6 ¹ ₂
0 3 ¹ ₂	0 7	1 2	3 6	0 9 ¹ ₂	0 7	3 2	9 6	0 3 ¹ ₂	0 7
0 3 ¹ ₂	0 7 ¹ ₂	1 3	3 9	0 9 ¹ ₂	0 7 ¹ ₂	3 3	9 9	0 3 ¹ ₂	0 7 ¹ ₂
0 4	0 8	1 4	4 0	0 10	0 8	4 4	10 0	0 4	0 8
0 4 ¹ ₂	0 8 ¹ ₂	1 5	4 3	0 10 ¹ ₂	1 8 ¹ ₂	3 5	10 3	0 4 ¹ ₂	0 8 ¹ ₂
0 4 ¹ ₂	0 9	1 6	4 6	0 10 ¹ ₂	1 9	3 6	10 6	0 4 ¹ ₂	0 9
0 4 ¹ ₂	0 9 ¹ ₂	1 7	4 9	0 10 ¹ ₂	1 9 ¹ ₂	3 7	10 9	0 4 ¹ ₂	0 9 ¹ ₂
0 5	0 10	1 8	5 0	0 11	1 10	3 8	11 0	0 5	0 10
0 5 ¹ ₂	0 10 ¹ ₂	1 9	5 3	0 11 ¹ ₂	1 10 ¹ ₂	3 9	11 3	0 5 ¹ ₂	0 10 ¹ ₂
0 5 ¹ ₂	0 11	1 10	5 6	0 11 ¹ ₂	1 11	3 10	11 6	0 5 ¹ ₂	0 11
0 5 ¹ ₂	0 11 ¹ ₂	1 11	5 9	0 11 ¹ ₂	1 11 ¹ ₂	3 11	11 9	0 5 ¹ ₂	0 11 ¹ ₂
0 6	1 0	2 0	6 0	1 0	2 0	4 0	12 0	0 6	1 0
0 6 ¹ ₂	1 0 ¹ ₂	2 1	6 3	1 0 ¹ ₂	1 0 ¹ ₂	4 1	12 3	0 6 ¹ ₂	1 0 ¹ ₂
0 6 ¹ ₂	1 1	2 2	6 6	1 0 ¹ ₂	2 1 ¹ ₂	4 2	12 6	0 6 ¹ ₂	1 1
0 6 ¹ ₂	1 2	2 3	6 9	1 0 ¹ ₂	2 1	4 3	12 9	0 6 ¹ ₂	1 2
0 7	1 0 ¹ ₂	2 4	7 7	1 1	2 2	4 4	13 0	0 7	1 0 ¹ ₂
0 7 ¹ ₂	1 2 ¹ ₂	2 5	7 3	1 1 ¹ ₂	2 3 ¹ ₂	4 5	13 3	0 7 ¹ ₂	1 2 ¹ ₂
0 7 ¹ ₂	1 3	2 6	7 6	1 1 ¹ ₂	2 3	4 6	13 6	0 7 ¹ ₂	1 3
0 7 ¹ ₂	1 3 ¹ ₂	2 7	7 9	1 1 ¹ ₂	2 3 ¹ ₂	4 7	13 9	0 7 ¹ ₂	1 3 ¹ ₂
0 8	1 4	2 8	8 0	1 2 ¹ ₂	2 4	4 8	14 0	0 8	1 4
0 8 ¹ ₂	1 4 ¹ ₂	2 9	8 3	1 2 ¹ ₂	2 4 ¹ ₂	4 9	14 3	0 8 ¹ ₂	1 4 ¹ ₂
0 8 ¹ ₂	1 5	2 10	8 6	1 2 ¹ ₂	2 5	4 10	14 6	0 8 ¹ ₂	1 5

† *Sect. 68.* And it is enacted par. 5. "That all persons selling the said bread, shall be liable to the penalties, as they are liable to by the laws now in being, for any misdemeanour or neglect, in respect to making, marking, selling, or exposing to or for sale, wheaten or household bread." Penalties.

† *Sect. 69.* Provided, par. 6. "That if any information shall be laid against any baker for making, marking, baking, or exposing to or for sale, any bread, purporting to be the standard wheaten bread aforesaid, made of flour, not being the whole produce of the wheat, the bran or hull thereof only excepted, and weighing three fourth parts of the weight of the wheat whereof it was made, and such baker shall prove that he bought the said flour, as and for such flour as aforesaid, of the miller or mealman, naming his name and place of abode; the baker shall stand clear and acquitted, and the miller or mealman shall pay the penalties of adulterating corn, meal, or flour, by 31 Geo. 2. c. 5, 6." The miller or mealman selling adulterated flour, shall forfeit the penalties inflicted by act 31 Geo. 2.

† *Sect. 70.* And it is further enacted by par. 7. "That when any magistrate, shall have let an assize on or fixed the price of the said standard wheaten bread, they may omit the setting an assize upon, or fixing the price of any other sort of bread." An assize on the price of wheat, barley, or malt, shall be taken, and the price of any other sort of bread, shall be taken, by the assize.

† *Sect. 71.* And it is further enacted by par. 8. "That the justices at any general or quarter-session may prohibit for three months, unless they shall see cause sooner to revoke the order for such prohibition, at any adjourned quarter, or special sessions makers from making for sale, any other sorts of bread, of a superior quality, and sold at a higher price than the standard wheaten bread: provided, that no such order for such prohibition be in force, until one calendar month after the date thereof; and every order shall be entered in a book, to be inspected by the makers without paying any fee: And after the making every such order the justices shall cause a copy to be affixed in some market, or other public town, within the division, or inserted in some public newspaper, published in the county, or place." Quartermasters may prohibit the sale of bread, of a superior quality, and sold at a higher price than the standard wheaten bread.

† *Sect. 72.* Provided, par. 9. "That within London, and the liberties thereof, the company of bakers, and in any other place, any baker may offer all such objections as such company of bakers think fit against such prohibition at the time when such justices shall have under consideration the ordering such prohibition as aforesaid." Complaints of the company of bakers, or any baker, against the prohibition, shall be made, and the objections shall be taken, at the time when the justices shall have under consideration the ordering such prohibition as aforesaid.

† *Sect. 73.* Provided par. 10. "That nothing shall prevent the magistrates and others, who are authorized to let an assize on bread, from allowing any white loaves or wheaten Wheaten loaves, or the price of 1d. or 2d. may be made.

"wheaten loaves of the price of one penny, or two pence, to be made and sold according to the table contained in 31 Geo. 2. s. 10."

No affize on coarser bread, at a lower price.

† *Sec. 74.* And whereas there may be many places where the inferior classes are used to bread made of wheat, of a coarse and cheaper sort than the standard wheaten bread, be it hereby further enacted by par. 11. "That any baker may make such inferior bread, provided he sell at a price under that of the household bread, as directed by 31 Geo. 2."

Bread coarser sold at the affixed household bread price, liable to penalties.

† *Sec. 75.* And it is further enacted, by par. 12. "That when and where any baker shall sell such inferior bread by weights and prices whereat the household bread aforesaid is at that time affized, or priced, or sold, he shall be liable to the same as bakers are now by law liable to for any of the like misdemeanor."

Powers of the magistrates.

† *Sec. 76.* And it is further enacted, par. 13. "That every magistrate shall have all powers relative to affizing, pricing, and regulating the standard wheaten bread and punishing as they have by any law now in being relative to any bread whatsoever."

No composition to be used.

† *Sec. 77.* Thirdly, As to ALE AND BEER. It is enacted by 1 Will. 3. sess. 1. c. 24. s. 17. "That no common brewer, or retailer of ale or beer, shall use therein any molasses, coarse sugar, or any composition or extract thereof, on pain of forfeiting the said liquor, and also 100 l. half to the king, and half to the prosecutor, if sued for in six months."

Penalty.

† *Sec. 78.* And it is enacted by 10 & 11 Will. 3. c. 21. s. 34. "That if any common brewer or retailer shall commit the said offence, or shall receive into his custody any quantity of the said materials exceeding ten pounds, he shall forfeit 100 l. to be recovered and mitigated by the laws of excise, and the servant or assistant therein 20 l. in like manner, and in default of payment shall be imprisoned three months."

† *Sec. 79.* And it is further enacted by 9 Ann. c. 12. par. 24-26. "That no common brewer, innkeeper, or victualler, shall use any broom, wormwood, or other bitter ingredient (to serve instead of hops) in any beer or ale for sale (except infusing the same after it is brewed and tunned, to make broom or wormwood ale or beer) on pain of 20 l. half to the prosecutor, &c. to be levied by the laws of excise."

† *Sec.*

† *Stat. 80.* And it is further enacted by 12 Ann. stat. c. 2. "That no common brewer or retailer of beer or ale shall use any sugar, honey, foreign grains, Guinea pepper, essentia bina, cocculus Indicus, or any unwholesome ingredients, in the brewing of ale or beer, or mix any of them therewith, on pain of 20*s.* to be distributed, recovered and mitigated as aforesaid."

N. B. As to enhancing the price of ale, vide 2 Geo. 3. Edw. 6. c. 23. and 2 Geo. 3. c. 24. before the other

† *Stat. 81.* And it is enacted by 2 Edw. c. 9. "That magistrates both in counties and in corporations, shall fix the price of all ale and beer vessels yearly, at their Easter sessions."

† *Stat. 82.* And it is further enacted by 12 Car. 2. c. 24. f. 34. and 1 Will. 3. c. 24. f. 3. "That within the bills of mortality every barrel of beer shall contain 36 gallons, and every barrel of ale 32 gallons, and that in all other places every barrel of ale or beer shall measure 34 gallons."

† *Stat. 83.* And it is further enacted by 11 & 12 Will. 3. c. 15. "That all retailers of ale and beer shall retail the same by a standard measure, to be marked by a magistrate, upon penalty of any sum between 10*s.* and 40*s.* and if they refuse to specify the quantities sold, they shall lose the privilege of detaining the goods of their guests in satisfaction of the reckoning."

Vide Blackerby, 10. 1 Burn's Justice 19

† *Stat. 84.* And it is further enacted by 1 Will. & Mary, sess. 1. c. 22. "That ale, beer, cyder and mum, may be exported upon paying the duties." But by 2 Geo. 3. c. 14. which recites the above act of Will. 3. "If any merchant or master of any ship or vessel, or other person, shall cause or suffer any of the said liquors, so exported as merchandize, to be unshipped, unladen, or laid on land, or put into any other ship or vessel within Great Britain, they shall forfeit the same, and also 50*s.* for every cask of such respective liquors so unshipped, &c." (1)

(1) N. B. For the excise and other regulations respecting ale, beer, cyder, perry, mum, mead, thegin, mead, sweets, verjuice, and vinegar, vide 2 Burn's Justice, p. 38 to 46.

† *Stat. 85.* As to the article of BUTTER and CHEESE, it is recited by 13 and 14 Car. 2. c. 26. That as butter is one of the principal commodities of the product of this kingdom, and is not only of universal use at home, but that great quantities are exported, it is thereupon enacted, "That every kilderkin of butter shall contain 112 lb. every firkin 56 lb. and Vol. I. L. 1 every

“ every pott 14 lb. reckoning 16 ounces to the pound, and
 “ exclusive of the tare of the kilderkin, firkin, or pott; that
 “ new and old butter shall not be mixed; nor any whey
 “ butter packed or mixed with butter made of cream, but
 “ that every package shall contain the same quality through-
 “ out; that no butter shall be salted with any great salt, nor
 “ more small salt mixed with it than is necessary for its pre-
 “ servation, on pain of forfeiting the same, and six times the
 “ value of every different pound of butter.”

8. 32. Oct. 7.
 c. 2. 4. 6. No
 butter or cheese
 to be exported
 from Ireland.

† *Stat.* 86. And it is further enacted, par. 3. “ That no
 “ persons whatsoever shall repack for sale any butter upon
 “ pain of double the value. And whoever shall pack butter,
 “ shall pack his butter into good and sufficient casks, &c.
 “ and shall set upon every firkin and cask when the same is
 “ thoroughly seasoned in water, a continuing visible mark of
 “ the just weight of the empty cask, and when filled with
 “ butter the first letter of his christian and surname at length,
 “ with an iron brand, on pain of 10 s. for every cwt. of
 “ butter, and so in proportion, for a greater or less quantity.
 “ And every potter shall set upon every pott which he shall
 “ make for the packing of butter, the just weight of such
 “ pott when burnt, and his christian and surname as aforesaid,
 “ on pain of one shilling for every pott he shall omit so to
 “ mark; and every farmer or packer of butter, two shillings
 “ for every pott he uses so omitted to be marked, one half to
 “ the poor, the other to the prosecutor, to be recovered by
 “ action of debt, indictment, information, or presentment,
 “ (if commenced within four months after the sale) either in
 “ the sessions of the peace, or in the court of record of the
 “ place where the offence is committed.”

† *Stat.* 87. And it is further enacted by 4 Will. & Mary,
 c. 7. “ That after the factor or buyer hath bought and con-
 “ tracted for the said commodity, and approved by searching
 “ and weighing the same, if he think fit, the seller shall not
 “ be liable to any of the penalties above specified, but that the
 “ said factor, or buyer, shall mark the said butter, or the
 “ cask wherein it is, and in case the same shall be afterwards
 “ exchanged or opened, the cask changed, or any bad butter
 “ mixed with good butter, or any other fraud be committed
 “ by the seller, the offender, on conviction by one witness
 “ before one justice, shall forfeit 20 s. for every such firkin
 “ and offence.”

† *Stat.* 88. And to the end the trade for butter and cheese
 may not be engrossed by particular persons, it is enacted,
 “ That every warehouse-keeper, weigher, searcher, or ship-
 “ per of butter and cheese, at any port or place in this king-
 “ dom, shall receive all butter and cheese brought to them
 “ for

" for any of the cheesemongers free of the city of London,
 " or other person making the said commodities, and shall take
 " care and ship the same, without preference on the next
 " vessel for London, unless the owners order the contrary, at
 " the rate of 2s. 6d. a load, and no more, on pain of 10s.
 " for every firkin of butter, and 5s. for every wey of cheese.
 " And the said weigher shall keep a book of receiving and
 " shipping the same, &c." (2)

(2) By 3 Hen. 6. c. 4. 13 Hen. 6. c. 3. Butter and cheese may be exported to any place.—By 1 Hen. 6. c. 8. The way of cheese shall be of a certain weight.—By 2 Ph. & Mary, c. 5. 13 Eliz. c. 25. f. 20. A licence is to be granted on the exportation.—By 21 Jac. 1. c. 22. Justice may restrain the purchasing of them.—By 32 Car. 2. c. 2. f. 94. The importation of foreign butter and cheese is restrained.—By 8 Geo. 1. c. 27. The packing of butter in the city of York is regulated.—By 17 Geo. 2. c. 8. The same at New Malton.—By 13 Geo. 3. c. 5. f. 2. Cheese may be imported for a limited time, duty free.

† *Secl.* 89. Fifthly, As to CATTLE, &c. It is enacted by 31 Geo. 2. c. 40. f. 11. " That no salesman or other broker
 " or factor who shall be employed to buy or sell any sort of
 " cattle for others, by commission, or for reward to be paid,
 " or taken by himself or any servant or agent, shall directly or
 " indirectly, for his own account, buy any live ox, bull,
 " cow, steer, bullock, heifer, calf, sheep, lamb, or swine,
 " in London, or within the bills of mortality, or at any place
 " while any such cattle shall be on the road, or be driving,
 " bringing, or coming up, or offered to or for sale in London,
 " or within the bills of mortality (other than such cattle
 " which any such salesman, broker, or factor shall actually
 " purchase for the necessary use or provision of his family,
 " and shall actually use accordingly), and that no such salesman,
 " broker, or factor, shall sell or expose, or offer to or
 " for sale on his own account, in London, or within the
 " bills of mortality, either by himself, or his servant or agent,
 " any live ox, bull, cow, steer, bullock, heifer, calf, sheep,
 " lamb or swine, upon pain, on every conviction, of forfeiting
 " double the value of any live cattle which he shall so buy or
 " sell on his own account; provided the prosecution be commenced
 " within three days after the offence committed."

† *Secl.* 90. " On complaint made on oath, the justice of
 " the district is to summon, &c. the offender and the witnesses,
 " and, on the parties appearing or not appearing, thereupon
 " is to proceed to hear the complaint in a summary way,
 " and on such payment of the forfeiture on conviction,
 " is to issue his warrant for the levying thereof by distress and
 " sale, and for want of distress, to commit the offender for
 " any time not exceeding one month, nor less than ten days,
 " unless payment be sooner made. And a witness refusing
 " to be examined, may be committed not exceeding ten days.
 " Appeal may be made by the seller if aggrieved, to the
 " quarter sessions, on giving security and notice, and the
 " termination of the sessions to be final."

† *Sec. 91.* Sixthly, As to FISH I shall examine the size and preservation of them. 2. The rules for fishing in and near the sea. 3. Their importation.

† *Sec. 92.* It is said that fish ponds, or waters wherein fish are kept and nourished, being a matter of profit and tending to the increase of victuals any man may of common right erect them; and it is therefore provided by 3 Edw. 1. c. 20. "That if any be attainted at the suit of the party of trespassing in parks or ponds, great and large amends shall be awarded, the offender suffer 3 months imprisonment, make fine at the discretion of the court, and find surety not to offend again, &c.

† *Sec. 93.* As to the first particular, it is enacted by 1 Geo. 1. st. 2. c. 18. s. 14. "That no person shall cause any thing to be done in the Severn, Dee, Wye, Teame, Tees, Ribble, Mersey, Dun, Air, Oouse, Swaile, Calder, Wharf, Eure, Darvent, or Trent whereby the spawn of any salmon, or any salmon not 18 inches from the eye to the extent of the middle of the tail shall be taken or killed. Or shall set any thing across the said rivers whereby the salmon may be hindered from passing up to spawn. Or shall from 31 July to 12 November (except in the Ribble, where they may be taken between the 1 Jan. and 15 Sep) take any salmon of any kind; or shall after every 12th November fish there for salmon with any net less than 2½ inches in the mesh, on pain of forfeiting the fish, (a) nets, and 5 l. on conviction, within one month, on view, confession, or one witness by distress: and to be distributed half to the informer and half to the poor, on default hard labour for any term between one and three months and such other corporal punishment as the justice shall think fit.

(a) As it is not clear whether the fish, nets, or both are forfeited to the King, 2 Burn 321.

† *Sec. 94.* And it is further enacted, par. 15. "That no salmon out of the said rivers shall be sent to London under 6 lb. weight, on pain that the sender, buyer, and seller shall forfeit 5 l. and the fish to be levied and distributed on conviction as aforesaid, or to suffer imprisonment as aforesaid for three months unless sooner paid. But by s. 17. an appeal may be to the next sessions."

† *Sec. 95.* And it is enacted by 13 Edw. 1. st. 1. c. 47. "That no salmon shall be taken in any water where salmon are taken between 8th September and the 11th of November, nor shall any young salmon be taken at mill pools (by 13 Rich. 2. s. 1. c. 19.) in any other places from Mid April to Midsummer, on pain of having the nets and engines burnt, for the first offence, for the second imprisonment for a quarter

“ quarter of a year, for the third a whole year, and so on as
 “ the trespass shall increase; and overseers shall be assigned (a) (a) 2 Inst. 477.
 “ to inquire of the same.”

† *Stat. 96.* And it is further enacted by 13 Rich. 2. ft. 1.
 c. 19. “ That no persons shall put into any waters at any
 “ time of the year any nets called *falkers*, nor any other en-
 “ gines whatever by which the fry or breed of salmon, lamp-
 “ reys or any other fish may be destroyed, on pain as afore-
 “ said.—And all waters in *Lancashire* shall be put into defence
 “ as to taking of salmon from Michaelmas to Candlemas and
 “ in no other time of the year.”

† *Stat. 97.* And it is enacted by 17 Rich. 2. c. 19. “ That
 “ the justices of peace, and the lord mayor of London on the
 “ Thames and Medway, shall survey the offences in both the
 “ acts last above mentioned, and shall survey and search all
 “ the weirs in such rivers, that they shall not be very straight
 “ for the destruction of such fry and brood, but a reasonable
 “ wideness after the old assize used and accustomed, and they
 “ shall appoint under conservators who shall be sworn to make
 “ like survey, search and punishment, and they shall enquire
 “ in sessions as well by their office, as at the information of
 “ the under conservators of all defaults aforesaid, and shall
 “ cause them which shall be thereof indicted to come before
 “ them, and if they be thereof convict, they shall have im-
 “ prisonment and fine at the discretion of the justices; and
 “ if the same be at the information of an under conservator
 “ he shall have half the fine.”

† *Stat. 98.* It is enacted by 1 Eliz. c. 17. made perpetual
 by 3 Car. 1. c. 4. “ That no person of whatever estate, de-
 “ gree or condition, by any ways or means whatsoever shall
 “ take and kill any young brood, spawn or fry of eels, salmon,
 “ pike, or of any other fish, nor shall take or kill any salmon
 “ or trouts not being in season, nor any pike or pikerel not
 “ being in length 10 inches or more; nor any salmon not be-
 “ ing in length 16 inches or more; nor any trout not being
 “ in length 8 inches or more; nor any barble not being in
 “ length 12 inches or more, nor shall any fish be taken with
 “ any manner of net or by any other engine or device what-
 “ soever but only with a net or trammel whereof every mesh
 “ or mark shall be two inches and a half broad, angling ex-
 “ cepted.”

Whether the
 penalty is 20 l.
 or 20 s. for this
 offence. V. 2.
 2 Burn's Ju. 66
 323.

† “ But it is provided that such nets and other engines as
 “ have been used for the taking of smelts, loches, minnows,
 “ bullheads, gudgeons or eels may still be in all such places
 “ where such fish have been used to be taken and killed, so that

“ such persons do not take, kill or destroy with such nets any
 “ other fish contrary to the meaning of this act.”

† The lord admiral of England. The mayor of London.
 “ The lord of every leet in England or Wales, or in default
 “ of being presented at the leet, the justices of assize, &c.
 “ and all persons lawfully intitled to have any conservation of
 “ rivers, streams or waters, are impowered to enquire into of-
 “ fences against this act by the oaths of 12 men or more, and
 “ to hear and determine the same within their respective jurif-
 “ dictions, and all fines, &c. resulting from the several con-
 “ sh to the use of such persons as heretofore
 “ lawfully had or were intitled to the same.”

† Stat. 99. And it is further enacted by 33 Geo. 2. c. 27.
 “ That no person shall take, or knowingly have in his posses-
 “ sion either in the water or on shore, or sell, or expose to
 “ sale any spawn, fry or brood of fish, or any unsizeable fish,
 “ or fish out of season, or any finel not 5 inches long. And
 “ any person may seize the same together with the baskets and
 “ package, and charge a constable or other peace officer with
 “ the offender and with the goods, and shall carry them before
 “ a justice, and on conviction before such justice, the same
 “ shall be forfeited and delivered to such prosecutor, and the
 “ offender shall besides forfeit 20s. half to prosecutor and half
 “ to the poor where the offence is committed, on default, by
 “ distress, to be committed to hard labour not exceeding 3
 “ months unless sooner paid. But the justice may remit any
 “ portion equal to or within one half of the said penalty.”

† Stat. 100. And by 2 Hen. 6. c. 15. “ If any person shall
 “ fasten any nets over rivers, to stand continually day and
 “ night he shall forfeit 5 l.”

† Stat. 101. As to the second particular. And it is further
 enacted by 3 Jac. 1. c. 12. “ That any person who shall
 “ erect any new wear along the sea shore or in any haven,
 “ harbour or creek or within 5 miles of the mouth thereof, or
 “ shall take (spoil or destroy any spawn, fry or brood of any
 “ sea fish in any device whatsoever, shall forfeit 10 l. for every
 “ offence, half to the king, half to the informer; and if any
 “ person shall within the distance of the places aforesaid fish
 “ with any draw net or drag net under three inches mesh, viz.
 “ one inch and a half from knot to knot except for the taking
 “ of smoulds in Norfolk only, or with any net with canvass or
 “ other engine or device whereby the spawn, fry or brood of
 “ sea fish may be destroyed, shall forfeit the net and 10 s. to be
 “ levied by distress. But it is provided that nothing in this
 “ act shall restrain the taking of herrings, pilchards, sprats or
 “ lavideriau

“laviderian with nets of a lesser mesh, and further that it shall not extend to Anglesea.” (3)

(3) For the preservation of fish in the Severn. See 30 Car. 2. ft. 1. c. 9. a private act.

† Sect. 102. And by 1 Geo. 1. ft. 2. c. 18. “Whoever shall use at sea upon the English coast, any haul net, drag net, or set net for catching any fish, except herrings, pilchards, sprats or laviderian, of less than three inches and a half mesh, from knot to knot; or which hath a false or double bottom; or shall put one net behind another; he shall, on conviction before one justice, on the oath of two witnesses, in one month after the offence forfeit the same and 20 l. half to the informer and half to the poor, by distress, and for want of sufficiency to be committed for 12 months, and the nets to be burnt. But an appeal may be made to the next session.”

† Sect. 103. It is also enacted by the said statute 1 Geo. 1. ft. 2. c. 18. “That if any person shall bring to shore or expose to sale any fish less than the following sizes from the eyes to the extent of the tail, *viz.* Brelt or turbot 16 inches, brill or pearl 14. Codlin 12. Whiting 6. Bass and mullet 12. Sole, plaice and dab 8. Flounder 7. he shall forfeit the fish to the poor and 20 s. half to the informer and half to the poor, to be levied as aforesaid, and for default or insufficiency to be severely whipped and kept to hard labour from 6 to 14 days. Appeal to next sessions.”

† Sect. 104. But it is enacted by 33 Geo. 2. c. 7. “That Brett, turbot, brill or pearl, although under the said dimensions, may be exposed to sale so as the same be not sold by retail for above 6 d. per pound; and if any greater price shall be demanded or taken; or such fish shall not be weighed or measured if required, the same shall be forfeited and the offender shall pay 20 s. to be recovered, &c. as before directed. And the money paid for the purchase of such fish shall be returned to the party.”

† Sect. 105. It is enacted by 9 Geo. 2. c. 33. s. 4. “That no person shall take, kill or destroy any lobsters on the coast of Scotland from the 1st of June, to the 1st of September, on pain of 5 l. on conviction, before two justices, of the shire on the coast where the offence shall be committed.” (4)

(4) For the regulation relating to the price of fish within the bills of mortality. Vide 10 and 11 Will. 3. c. 22. 1 Geo. 2. c. 22. 16 Geo. 2. c. 49. 29 Geo. 2. c. 39. 30 Geo. 2. c. 21.

† *Stat.* 106. As to the third particular respecting the importation of fish, it is enacted by 18 Car. 2. c. 2. "That if any ling, herring, cod or pilchard, salmon, eels or congers, taken by foreigners shall be imported or exposed to sale, any person may seize the same, to be divided equally between the informer and the poor."

† *Stat.* 107. And it is further enacted, by 1 Geo. 1. c. 18, and 9 Geo. 2. c. 33. "That no fish taken by or received of any foreigner, except protestants inhabiting in England shall be imported (except eels, stockfish, anchovies, sturgeon, botarge or caveas, lobster, and turbot) on pain of 100 l. and the master of the vessel 50 l. half to the poor and half to the informer who shall sue in 12 months in any of the courts at Westminster." (5)

respecting the selling of fish. Vide 2 Burn's Justice, 113 to 123. and for this in 17. Vide 23 Cap. 2. c. 14.

† *Stat.* 108. Seventhly, As to BACON and PORK, it is enacted, by 18 Car. 2. c. 2, "That if any beef, pork, or bacon, for sale, shall be imported, they may be seized, and shall be forfeited, one half to the poor, and the other to the person who shall seize the same: and by the 20 Car. 2. c. 7. those who shall seize the same are indemnified."

† *Stat.* 109. And it is further enacted, by 12 Car. 2. c. 4. f. 11. "That when beef, pork, and bacon, do not exceed, viz. beef, 5 l. the barrel, pork 6 l. 10 s. the barrel, and bacon 6 d. a pound in price, at the ports from whence they are laden; and at the time of their lading, the same may be shipped, carried out, and exported."

† *Stat.* 110. And by 22 Car. 2. c. 13. f. 4. "Beef, pork, and bacon, may be exported by native or foreigner, although the same do exceed the prices above mentioned at the ports, &c. at the time of their lading."

† *Stat.* 111. And it is further enacted, by 3 Will. and Mary, c. 8. "That all sorts of beef, pork, or hogs flesh, may be exported into any part of the world in amity with the Crown, free from any custom or imposition whatsoever."

† *Stat.* 112. By 4 Will. and Mary, c. 5. f. 2. "Four pence shall be paid for every pound of bacon imported."

† *Stat.* 113. By 5 Will. and Mary, c. 2 f. 4. "The said sum shall be paid from the first day of the session."

† *Stat.*

† *Stat.* 114. And by 3 Geo. 2. c. 20. s. 16. "Beef or
" pork salted with foreign salt shall receive on exportation
" 1 s. 6 d. per barrel."

† *Stat.* 115. Eighthly, As to HAY and STRAW, it is enacted, For the regulation of the hay-market at Westminster Vide 8 and 9 Will. 3. c. 17.
by 2 Will. and Mary, sess. 2. c. 8. s. 16. "That every
" truss of old hay brought or offered to be sold within the bills
" of mortality, between 1 August and 1 June, shall contain
" and be the full weight of 56 lb. at least; and that every
" truss of hay brought, or offered to be sold, as aforesaid, be-
" tween 1 June and 1 August, being new hay of that sum-
" mer's growth, shall be and contain the full weight of 60 lb.
" and old hay of any former year's growth the weight of
" 56 lb. as aforesaid; and if any hay shall be brought, or
" offered to be sold, as aforesaid, whereof any truss shall be
" of less weight than aforesaid, the person so bringing or of-
" fering such hay to be sold, shall forfeit for every truss, not
" being the full weight, eighteen pence."

† *Stat.* 116. And it is further enacted, by 31 Geo. 2. c. 40.
" That all straw which shall be sold or delivered in, or
" brought to, or exposed to sale in London, or within the
" bills of mortality, shall be sold and delivered in bundles or
" trusses, firmly bound up, and of the full weight of 36 lb.
" of good and sound straw, exclusive of any other thing
" which shall be put therein; and whoever shall bring into,
" or expose to sale, in London, or within the bills of morta-
" lity, or in any place within the distance of thirty miles
" from the extent of any part of the limits of the said bills of
" mortality, when straw shall be sold in bundles or trusses,
" any bundle or truss of straw which shall be of less weight
" than 36 lb. of good and sound straw, or which shall be in
" the inside of a different quality or goodness from which on
" the outside it shall appear to be, shall forfeit twenty pence
" for every offence, and the sum of one shilling for every
" bundle or truss of straw."

† *Stat.* 117. And it is further enacted by said statute, par 2.
and 3. "That every truss of hay shall be made up in like
" manner as the straw aforesaid, and that such hay only as
" shall be good, shall be deemed and taken to be the hay
" which is to make up the weight every truss of hay by law
" ought to be; and also that the pair of bands with which
" any truss of hay shall be bound, shall not exceed the weight
" of 5 lb. upon pain of forfeiting for every offence one shil-
" ling."

† *Stat.* 118. And it is further enacted by par. 4. "That
" whoever shall bind hay contrary to the directions of this
" act, shall forfeit three pence for every bundle or truss of
" hay

"hay or straw, if objected to within twenty-four hours by the proprietor."

M. B. For the regulation of the markets with respect to the sale of these articles. Vide the 6, 7, 8, 9 and 10 sections of the act.

† *Sec. 119.* And it is further enacted by par. 5. "That no person who shall act as a common saleman in selling hay or straw for any other person for gain or reward, or by commission in London, or within the bills of mortality, shall directly or indirectly buy any hay or straw on his own account, other than what he shall purchase to spend for his own use; and if any such person shall buy any hay or straw on his own account to sell again, or shall sell in London, or within the bills of mortality, any hay or straw which shall have been brought by him on his account shall forfeit one shilling for every truss."

† *Sec. 120.* Ninthly, As to **FRUIT**, it is enacted, by 1 Ann. stat. 1. c. 15. §. 1. "That the measure commonly called water measure shall be round, and in diameter 18 1-half inches within the hoop, and 8 inches deep, and no more, and so in proportion for any greater or lesser measure; and that every such measure, by which apples and pears are sold, shall be heaped as usually; and that whoever shall buy or sell apples or pears by or with any other measure, shall forfeit ten shillings for every offence, half to the informer, and half to the poor, on conviction by one witness, before one magistrate, to be levied by warrant of distress. But this act shall not extend to measures sealed and allowed by the company of fruiterers of London, which are used in the said city, or within three miles thereof."

N. 4. By 8 Geo. 2. c. 26. there was an addition at duty of 2 s. 6 d. on the import of apples.

† *Sec. 121.* And it is further enacted by 10 Geo. 2. c. 27. "That upon all apples imported into Great Britain shall be paid, over and above the duties already imposed, an additional duty of two shillings a bushel, and so for any greater or less quantity, to be paid down in ready money by the importers at the time of landing the same, which duty shall be applied in the like manner as other duties upon the same article."

• *Sec. 122* Tenthly, As to **HONEY AND WAX**, it is enacted, by 23 Eliz. c. 8. "That whoever, in the making and melting of wax, shall mix or mingle the same with resin, tallow, turpentine, or any other deceitful thing, to the intent to sell the same, or to offer the same to be sold or uttered for wax, shall forfeit the same; and if the same shall happen to be sold before the corruption is discovered, the melter, mingler, or corrupter, or the causer or procurer thereof, shall forfeit for every lb. 2 s. half to the queen, half to the party decerned, if he will sue for it, or any other person that will sue for the same in any of the queen's courts of record."

† *Sec.*

† *Secl.* 123. And it is further enacted, par. 2. "That every melter and maker up of unwrought wax shall have a stamp of the breadth of sixpence, wherein two letters shall be plainly graven, signifying his name and surname, with which every piece of wax shall be printed or stamped triangle in three places, upon the outside of the upper part of every piece so melted and cast, on pain to forfeit the value of every piece of cake sold, or offered to be sold, and not so stamped or marked."

† *Secl.* 124. And it is further enacted, par. 3. "That whoever shall melt, mix, work, or sell any wrought wax, or any stuff or wares wrought with wax, shall have a stamp or seal set to his work, that it may be known who were the workers thereof, on pain of forfeiting the same, half to the queen, or party deceived, &c. as before mentioned."

† *Secl.* 125. And it is further enacted, "That all barrels, kilderkins, and firkins filled with honey by the maker and filler, shall be marked with two letters standing for his name and surname, each letter of an inch and a half in length at least, burnt upon the head of the cask with a hot iron, upon pain of 6 s. 8 d. for every package sold, or offered to be sold, and not so marked."

† *Secl.* 126. And it is further enacted, "That whoever shall fill and sell, or cause to be filled and sold, or offered to be sold, any barrel, kilderkin, or firkin, with honey, for or in the name of a barrel, kilderkin, or firkin, containing less than 32 wine gallons the barrel, 16 wine gallons the kilderkin, and 8 wine gallons the firkin, shall forfeit for every half gallon so lacking, five shillings. And whoever shall corrupt the honey so sold with any deceitful mixture shall forfeit the barrel or vessel, and the honey therein, to be divided between the queen and the prosecutor."

† *Secl.* 127. But it is provided, "That this act shall not extend to persons selling the wax of their own bees, in small pieces in open market, nor to servants employed by their masters in mingling, &c. so as they will confess the same."

† *Secl.* 128. "And whoever shall counterfeit any of the stamps or marks above mentioned, or shall use the marks of another, shall forfeit 5 l. to be recovered and divided as aforesaid, and for non-sufficiency of payment to be set on the pillory in the next market town, and suffer three months imprisonment."

† *Secl.* 129. Eleventhly, As to COALS, it is enacted, by 12 Ann, stat. 2. c. 17. "That the coal bushel shall be made
" round

“ round with a plain and even bottom, nineteen and one half
 “ inches in diameter, and to contain one *Winchester* bushel,
 “ and one quart of water. A brass standard of which bu-
 “ shel shall be kept in the Exchequer.”

† *Stat.* 130. And it is enacted by 16 and 17 Car. 2. c. 2.
 “ That all sea coal brought into the Thames shall be sold by
 “ the chaldron, containing 36 bushels heaped up, and ac-
 “ cording to the bushel sealed for that purpose at Guildhall,
 “ and so for a greater and lesser quantity; and that all other
 “ sorts of coals, sold by weight and not by measure, shall be
 “ sold after the proportion of 112 lb. *avordupois* to the hun-
 “ dred weight, upon pain of forfeiture, and of double the va-
 “ lue, on conviction by one justice where the offence shall
 “ be committed, half to the prosecutor, and half to the poor,
 “ or to the surveyor of the highways as the magistrate shall
 “ direct.”

† *Stat.* 131. And it is further enacted by 17 Geo. 2. c. 35.
 “ That any three justices shall be empowered to set the prices
 “ of sea coals, as they, from time to time, shall judge rea-
 “ sonable, allowing a competent profit to the retailer, be-
 “ yond the price paid by him to the importer, &c.; and if
 “ any engrosser or retailer of such coals shall refuse to sell as
 “ aforesaid, the justices taking a constable, may enter the
 “ wharf, &c. and sell the same, returning the produce to
 “ such engrosser or retailer, deducting the charges; but no
 “ interested person shall be engaged in setting such price as
 “ aforesaid.” (6)

† For regulation respecting coals within the bills of mortality, vide 3 Geo. 2. c. 26. 11
 27. 2. c. 19 Geo. 2. c. 20 Geo. 2. c. 49. 23 Geo. 2. c. 26. 32 Geo. 2. c. 27.
 Geo. 3. c. 21 Geo. 34.

CHAPTER THE EIGHTY-FIRST.

OF BARRATRY.

Minshew.
 Barrator.
 Spelman.

IN treating of Barratry, I shall consider: First, Who shall
 be said to be a Barrator. Secondly, In what manner such
 an offender is to be proceeded against. Thirdly, To what
 punishment he is liable.

Self. 1. As to the first point it seems, That a Barrator is a
 common mover, exciter, or maintainer of suits or quarrels,
 either in courts, or in the country.

Dalt. n. 38.
 Co. Lit. 368.
 2 Coke 36.
 2 Cruise 54.

Sett. 2. And it is said not to be material, whether the courts wherein such suits are commenced, be of record or not, or whether such quarrels in the country relate to a disputed title of possessions or not; but that all kinds of disturbances of the peace, and the spreading of false rumours and calumnies, whereby discord and disquiet may grow among neighbours, are as proper instances of barratry, as the taking or keeping the possession of lands in controversy.

Co. Lit. 362.
8 Coke 36.

Sett. 3. But it hath been holden, That a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However if such actions be merely groundless and vexatious without any manner of colour, and brought only with a design to oppress, the defendants, I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them.

1 R. Abr. 355.
3 Modern 98.
8 Coke 36.

Sett. 4. But it seems that an attorney is in no danger of being judged guilty of an act of barratry in respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy.

3 Mod. 97, 98.

Sett. 5. Also it seems clear, That no one can be a Barrator in respect of one act only; for every indictment for such crime must charge the defendant with being *communis barrator*.

8 Coke 36.

Sett. 6. It seems to have been holden, That a feme covert cannot be indicted as a common barrator; but this opinion seems justly questionable; for since a feme covert is as capable of exciting quarrels, in the frequent repetition whereof the notion of barratry seems to consist, as if she were sole, why should she not as properly be indictable for it?

2 Rolle 39.

See chap. 1.
sect. 1.

Sett. 7. As to the second point, viz. In what manner offenders of this kind are to be proceeded against, it is enacted by 34 Edw. 3. c. 1. "That in every county shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy of the county, &c. and that they shall have power to restrain offenders, rioters, and all other barrators, and to pursue, arrest, take, and chastise them, according to their trespass or offence; and so cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement, &c."

Sett. 8. It seemeth from these words, That justices of peace (as such) have cognizance of barratry without any other commission, *sed quare*; for the contrary opinion seems to have been holden in Rolle's Reports.

Con. B. 2. c. 8.
f. 38, 39.
Ylverton 46.
2 Rolle 151.

1 Modern 238.
1 Sid. 282.
C. Jac. 526.

SecT. 9. However it seems clear, that no general indictment of this kind, charging the defendant with being a common oppressor, and disturber of the peace, and stirrer up of strife among neighbours, is good, without adding the words *communis barrator*, which is a term of art appropriated by the law to this purpose.

(a) 2 R. Ab.
79. 82.
C. Jac. 527.
C. Car. 340.
2 Keb 409, 470.
C. Eliz. 148.

SecT. 10. (a) Also it seemeth to be certain, That an indictment of Barratry concluding *contra formam statuti*, is good, though no statute be made directly against it; but only for the punishment of it, supposing it an offence at common law.

(b) 2 Keb. 410.
C. Eliz. 195.
Con. Lat. 194.
2 Hale 180.
Palmer 450.
1 Rolle 295.

SecT. 11. (b) Also it hath been holden, That an indictment of this kind may be good, without alledging the offence at any certain place, because from the nature of the thing, consisting in the repetition of several acts, it must be intended to have happened in several places; for which cause it is said, That a trial ought to be by a jury from the body of the county.

(c) C. Jac. 527.

SecT. 12. (c) But it hath been resolved, That such indictment is not good, without concluding *contra pacem*, &c. for this is an essential part of it.

1 Mod. 18.
Ray. 490.

SecT. 13. (d) Also it seemeth to be settled practice, not to suffer the prosecutor to go on in the trial of an indictment of this kind, without giving the defendant a note of the particular matters, which he intends to prove against him: for otherwise it will be impossible to prepare a defence against so general and uncertain a charge, which may be proved by such a multiplicity of different instances.

Hutton 164.

1 P. M.
113, 117.

SecT. 14. As to the third point, *viz.* In what manner offenders of this kind are to be punished. It is said, That if they be common persons, they are to be fined and imprisoned, and bound to their good behaviour; and if they be of any profession relating to the law, that they ought also to be farther punished, by being disabled to practise for the future.

CHAPTER THE EIGHTY-SECOND,

OF USURY.

OFFENCES, under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace, which may be committed by private persons

persons without any relation to an office, and which are neither infamous nor grossly scandalous, and more immediately affect the interests of particular persons, seem to be reducible to the following heads. Usury. Maintenance. And The offence of buying or selling pretended titles.

In treating of Usury, I shall consider: First, *What* it is. Secondly, *How* it is restrained by common law. Thirdly, *How* by statute.

Sec. 1. And first it seems, that usury, in a strict sense, is a contract upon the loan of money to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed, or not.

Wood's Inst.
B. 1. p. 425.
3 Inst. 751.
B. Usury, 12.
2 Strange, 316.
1243.
4 Comm. 196.
2 Comm. 455.

Sec. 2. And in a larger sense it seemeth, That all undue advantages taken by a lender against a borrower come under the notion of usury, whether there were any contract in relation thereto, or not; as where one in possession of land, made over to him for the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land.

Gill. 1070.
Compter 793.

Sec. 3. But it hath been resolved, That an agreement to pay double the sum borrowed, or other penalty on the non-payment of the principal debt at a certain day, is not usurious, because it is in the power of the borrower, wholly to discharge himself, by repaying the principal according to the bargain.

2 R. Abr. 309.
302.
26 Edw. 3. 71.
2 Inst. 89.
6 Rep. 69.
Compter 113.

Sec. 4. As to the second point, viz. How usury is restrained by the (a) common law. It is said, That anciently it was holden to be absolutely unlawful for a christian to take any kind of usury, and that whosoever was guilty of it, was liable to be punished by the censures of the church in his lifetime; and that if after death any one was found to have been an usurer while living, all his chattels were forfeited to the king, and his lands eiccheated to the lord of the fee.

(a) 3 Inst. 151.
2 R. Abr. 209.
307.
2 Inst. 646, 667.
Palm. 203, 204.
Tempus Hilde-
wick 420.

Sec. 5. Also it seemeth to have been the opinion of the makers of some late acts of parliament, as 5 Edw. 6. c. 20. 13 Eliz. c. 8. s. 5. and 21 Jac. 1. c. 17. s. 5. That all kinds of usury are contrary to good conscience.

2 Ventris 47.
2 Ventris 146.
14. Ca. Ab. 233.

Sec. 6. (b) And agreeably hereto it seemeth formerly to have been the general opinion, That no action could be maintained on any promise to pay any kind of use for the forbear-

(b) 2 R. Abr.
801.
26 Ed. 1. 11.
1 R. Abr. 18.

2 Roll. 239.
240. 469.
Palm. 293.

forbearance of money, because that all such contracts were thought to be unlawful, and consequently void.

(a) 1 R. Abr.
25.
2 R. Abr. 782,
802.
Winch. 114.
120.
C. Jac. 378,
279.
2 Ven. 198, 199.
3 Keble 15.
C. Car. 273.

Exod. c. 22.
v. 25.
Levit. c. 25.
v. 36. 37.
Deuter. c. 2
v. 19, 20.

Sec. 7. But it seems to be generally agreed at this day, (a) That the taking of reasonable interest for the use of money is in itself lawful, and consequently that a covenant or promise to pay it, in consideration of the forbearance of a debt, will maintain an action: For why should not one who has an estate in money be as well allowed to make a fair profit of it, as another who has an estate in land? And what reason can there be, that the lender of money should not as well make an advantage of it as the borrower? Neither do the passages in the *Mosaic* law, which are generally urged against the lawfulness of all usury, if fully considered, so much prove the unlawfulness, as the lawfulness of it; for if all usury were against the moral law, why should it not be as much so in respect of foreigners, of whom the Jews were expressly allowed to take it, as in respect of those of the same nation, of whom alone they were forbidden to receive it? From whence it seems clearly to follow, That the prohibition of it to that people was merely political, and consequently doth not extend to any other nation.

17 H. S. c. 9.
13 Eliz. c. 10.

B. R. H.
2 Strange 1

Th

or to m
if requested; at
the request is
never made.

Sec. 8. As to the third point, viz. How usury is restrained by statute. It is enacted by 12 *Annæ*, c. 16. "That no person whatsoever, shall upon any contract take, directly or indirectly, for loan of any money, wares, merchandize, or other commodities whatsoever, above the value of five pounds, for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time; and that all bonds, contracts, and assurances whatsoever, for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved (b) or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void."

3 Atk. 154.
3 Keble 259,
260.
1 Vent. 253.
2 Will. 250.

AND it is further enacted, "That all and every person or persons whatsoever, which shall upon any contract take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandize, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money or other thing, above the sum of five pounds for the forbearing of one hundred pounds for a year, and so after that rate

" for

“ for a greater or lesser sum, or for a (a) longer or shorter
 “ term, shall forfeit and lose for every such offence the treble
 “ value of the money, wares, merchandize, and other things
 “ so lent, bargained, exchanged, or shifted.”

(a) Vide C. Jac.
 25.
 Moor 644.
 Nov 41.
 C. Car. 283.
 4 Leonard 43.
 C. Eliz. 20.
 Douglas 224.
 3 Leo. 205.
 2 Leo. 38.

And note, That the treble value is not forfeited, unless something be taken above the legal rate. But the very contract alone avoids the security. (1)

(1) *U.* borrowed 100*l.* of *B.* on his bond conditioned to repay the same in six months, with 5 per cent. per ann. and gave two guineas to *B.* at the time the money was advanced, as a premium for the loan. The principal, and 2*l.* 10*s.* interest, were repaid at the end of six months. Under the first branch of the statute, the bond is void; but under the second the usury was not complete till the half year's interest was received, for the penalty is incurred only by *lending, accepting, and receiving* more than legal interest. Douglas 225. 3 Wilton 262. 2 Black. 796. For to constitute the offence three things must concur 1. A contract between the parties. 2. Monies, or other things lent. 3. Above 5 per cent. per ann. received by the lender for forbearance. 3 Wilton 362. 4 Burn 225.

Sec. 9. And it is farther enacted by the said statute,
 “ That every scrivener, broker, solicitor, and driver of bar-
 “ gains, for contracts, who shall take or receive, directly or
 “ indirectly, any sum or sums of money, or other reward or
 “ thing, for brokage, soliciting, driving or procuring the
 “ loan, or forbearing of any sum or sums of money, over and
 “ above the rate or value of five shillings for the loan, or
 “ forbearing of one hundred pounds, for a year, and to rate-
 “ ably; or above twelve pence, over and above the stamp
 “ duties, for making or renewing of the bond or bill for loan,
 “ or forbearing thereof, or for any counterbond or bill con-
 “ cerning the same, shall forfeit for every such offence twenty
 “ pounds, with costs of suit, and suffer imprisonment for half
 “ a year; the one moiety of all which forfeitures shall be to
 “ the queen, the other to him that will sue for the same, in
 “ the same county where the several offences are committed,

And the con-
 tract is void.
 Cartu. 252.

The expositions which were made of the former statutes of usury being equally applicable to this, which is penned almost in the very same words, I shall take notice of the principal of them.

1 Atk. 340.
 1 Vez. 142.

Sec. 10. First, That a contract made before the statute is no way within the meaning of it, and therefore that it is still lawful to receive six per cent. in respect of any such contract.

14 Gen. c. 79.
 Dahl. 12.
 Gen. R. 752.
 197.

Sec. 11. Secondly, That a bond made to secure a just debt payable with lawful interest, shall not be avoided by reason of a corrupt agreement between the obligors, to which the obligee was no way privy: As where *A.* being indebted to *B.* in 100*l.* agrees to give him 30*l.* for the forbearance of

Salkeld 344.
 Com. 4. 6
 5 Com. Dig. 610
 2 And. 121.
 Moor 752.
 C. Jac. 32. 33.
 Yelverton 4.
 2 Burr. 1477.

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M m

that

7 Modern 118.
2 Strange 1249.
1 Nisi P. 27.
Cathew 356.

that 100 *l.* for a year, and gives him a bond of 60 *l.* for payment of the 30 *l.* and for the payment of the 100 *l.* enters into a bond of 200 *l.* together with *B.* for the payment of a true debt of 100 *l.* due from *B.* to *C.* (2)

(2) But a bill of exchange for 200 *l.* for which goods instead of money had been colourably advanced, is void, although in the hands of an innocent indorsee, for a valuable consideration, and without notice of the usurious contract of the original parties. Douglas 708 to 716.

1 Modern 69.
5 Keble 122.
2 Modern 307.
1 Saxon 294.
Raym. 106.
2 Keble 525.
602.
3 Salkeld 300.
1 Buif. 17.
2 Roll. 308.
Cooper 114.
Rat. 106.

Sett. 12. Thirdly, That the receipt of higher interest, than is allowed by the statute, by virtue of an agreement subsequent to the first contract, does not avoid an assurance fairly made, and agreeable to the statute, but only subjects the party to the forfeiture of treble value; for the words are, "That all assurances for the payment of any principal, &c. whereupon or whereby there shall be reserved or taken above the rate of 5 *l.* in the hundred, &c. shall be utterly void."

1 Freeman 251. Expressly confirmed by Lord Mansfield, in *Floyer v. Edwards*, Cowper 114. Yet Lord Hale said, That if a mortgage be drawn for only 5 per cent. and the mortgage afterwards take above the legal interest, the deed would be void upon the word *take*. 3 A. King 154.

N. 37.
1 L. on 96.

Sett. 13. Fourthly, That in an assurance for the payment of fifty shillings for the use of 100 *l.* for six months, the computation shall be by calendar and not by lunar months, because by the latter the interest would exceed the rate allowed by the statute.

1 Bull. 14. 20.
Y. L. 1. 31.
Nisi P. 27.
2 K. 1. 100.
Co. 1 Leon. 56.

Sett. 14. Fifthly, That the receipt of interest before the time when it is in strictness due, being voluntarily paid by the debtor for the greater convenience of the creditor, or for any other such like consideration, without any manner of corrupt practice, or any previous agreement of this kind at the making of the first contract, does not make the party liable to the forfeiture of the treble value.

4 Leon. 2. 9.
3 Y. L. 1. 31.
305.
1 Leon. 20.
1 Leon. 121.
C. Jac. 1. 1.
6 Y. L. 1. 31. 618.
Nisi P. 27.
2 Leon. 1. 8.
Y. L. 1. 31. Ab.
722. H. 9.

Sett. 15. Sixthly, That the grant of an annuity for lives not only exceeding the rate allowed for interest, but also exceeding the known proportion for contracts of this kind, in consideration of a certain sum of money, is not within the meaning of the statute, unless there were some underhand bargain for the security of the repayment of the principal or consideration-money.

1 Vic. 164. 17 Geo. 1. c. 26. 1 Atk. 339, 351. C. Fitz. 27. 642, 643. Black. 230. Co. v. 71. Confirmed by Lord Thurlow, H. 21 Geo. 3. Brown's Rep. Chan. 93. Lord Latham v. Chalm.

C. J. c. 208.
579.
Lord Jav. v.
Kent
1 Keble 535.
7 11.

Sett. 16. Seventhly, That no contract is usurious, by which the lender runs the hazard of losing all his money, both principal and interest: As where on the loan of a certain sum for a year, for the victualling of a ship, it is agreed, That if the

the ship return, the lender shall have so many thousand fishes at such a rate, which exceeds the interest allowed by the statute, and if the ship never return, or if it perish by unavoidable casualties of sea, fire, or enemies, that then he shall have nothing: or where on the loan of 30*l.* a bond is given for the payment of 100*l.* on the marriage of a daughter of one of the parties; provided, That if either of them should die before, that then nothing should be paid: but it is clear, That if the interest only be hazarded on such a contract, and the whole principal secured, the whole is usurious. Also it hath been resolved, That an agreement to pay more than the lawful interest for the loan of a certain sum at such a day, if *A. B.* shall be then alive, and if he shall be dead, then to pay such a sum which is less than the principal, is void by the statute; for if such a contingency would exempt the case out of the statute, by the same reason twenty lives might be added, and the statute wholly evaded. (3)

Comb. 25. 1 Show. 8.

(3) Therefore a loan of 5000*l.* to be paid 1000*l.* on the death of *A.* in the life-time of *B.* is not usurious. 1 Atk. 339, 339.—If the contingency goes to the interest only, though real and not colourable, and notwithstanding it be a hazard, yet it is usurious. If the contingency relates to both principal and interest, and a higher rate of interest is taken, the courts have there enquired whether it were colourable or not, for it is 100*l.* to have 120*l.* at the year's end upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury, for the party is sure to have the principal again, come what come will. But if the principal and interest are little in hazard, it is not usury. *A.* gave credit to *B.* for jewels to a certain amount. *B.* not being able to raise money upon them, desired that *A.* would exchange them for old plate. *A.* said old plate was as good as money, and accordingly gave him the value of as much old plate as was left by *B.* then when the jewels had been sold for *the whole amount of what B. was to stand indebted to.* The court thought this did not come under the description of usury. *Johnson, qui tam v. Pickett, &c. B. R. 1785.* But see 1 Atk. 351. But if these loans are merely colourable, they may be usury. 1 Atk. 341. And it is the intent of the agreement, and not the expression, that determines it to be a loan, or a bribe. 1 Atk. 346. And where more than 5 per cent. is taken, if the substance of the contract be a borrowing and a lending, a slight colourable contingency only will not take it out of the statute. Cowper 770.

Sec. 17. Eighthly, That an assurance made in pursuance of a fair agreement for such interest as is allowed by the statute, shall not be avoided by the fault of the scrivener, who draws it up in such a manner as to bring it within the express letter of the statute: As where the parties agree, That 5*l.* shall be paid for the loan of 100*l.* for a year, and the scrivener, in drawing the bond for it, doth, without the knowledge of the parties, who are illiterate persons, make the 5*l.* payable at the end of half a year: or where on the fair loan of 100*l.* agreed to be paid with common interest, a mortgage is made for the 100*l.* with a proviso, that it shall be void on payment of 105*l.* at the end of one year, without any covenant for the mortgagor to take the profits till default be made of payment, so that in strictness the mortgagee is intitled both to the interest and profits.

C. Jac. 677, 678.
2 Roll. 414, 415.
Hut. 11.
1 Jon. 396.
C. Car. 501.
2 Van. 87.
3 Will. 396.
Hud. 418.
1 Freem. 264.
2 Mod. 107.
2 R. Abr. 723.
794, 81.

5 Co. 70.
Cowper 114.
115.

SECT. 18. Ninth, That the loan of money for lawful interest allowed by the statute, shall not be construed to be within the purview of it, in respect of any expectations which the lender may have of a voluntary gratuity to be given him by the borrower, if there be no kind of agreement relating to it.

5 Co. 69.
C. Jac. 509.
Cowper 113.
2 Bur. 716.
C. Eliz. 643.
1 Lut. 463.
2 Bur. 891.
1 Atk. 342.
1 Atk. 351.
5 Co. 69.
See Min. 197.
2 Ark. 16.
1 Ark. 150.
Cowper 114.
2 Strong 1243.

SECT. 19. Tenth, That the reservation of a greater sum than is allowed by the statute for interest, upon the non-payment of the principal at the end of the year is not usurious within the statute, because it is in the power of the borrower to avoid the payment of the money so reserved, by paying the principal at the day appointed; yet it seemeth clear, that if it were originally agreed, that the principal money should not be paid at the time appointed, and that such clause was inserted only with an intent to evade the statute, the whole contract is void; for the construction of cases of this nature must be governed by the circumstances of the whole matter, from which the intention of the parties will appear in the making of the bargain, which, if it was in truth usurious, is void, however it may be disguised by a specious assurance. (4)

(4) 1. "The law is whatever respect regard to the statute, the nature and substance of the transaction, and the view of the parties must be taken to satisfy the court that there is a loan of money, and when the real truth is ascertained, the wit of man can not find a shift to the detriment of the statute, and though the statute mention only "for loan of money, war, and merchandise, yet it comprehendeth every other necessary thing, if the substance of it be a loan, will come under the word "inductively." Cowper 113, 746. Douglass 727. If a man borrow goods the value of the goods is usurious. Black 126. But if goods are sold to be paid for at the expiration of the month, and give the seller such a fractional profit as exceeds the legal rate of interest, yet it is not usury. Fryer v. Ewbank. Plunket v. Carter. Cowper 112, 116.

2 Co. 121.
C. Jac. 509.
1 Atk. 351.
1 Atk. 352.
2 Bur. 716.
C. Jac. 509.
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1 Atk. 398.
1 Atk. 399.
1 Atk. 400.

SECT. 20. Eleventh, That a fine (a) levied, or judgment suffered, in pursuance of an usurious contract, may be avoided by an averment of the corrupt agreement, as well as any common specialty, or parcel contract. And in an *assumpsit* (b) if it appears, either upon the evidence, or from the plaintiff's own expleis shewing in his declaration, that the contract was usurious, he cannot recover. But a specialty cannot be avoided by shewing appearing on evidence or on the face of the condition, but it must be pleaded.

(a) See 1 Atk. 351. (b) See 1 Atk. 352. See also 1 Atk. 353. See also 1 Atk. 354. See also 1 Atk. 355. See also 1 Atk. 356. See also 1 Atk. 357. See also 1 Atk. 358. See also 1 Atk. 359. See also 1 Atk. 360. See also 1 Atk. 361. See also 1 Atk. 362. See also 1 Atk. 363. See also 1 Atk. 364. See also 1 Atk. 365. See also 1 Atk. 366. See also 1 Atk. 367. See also 1 Atk. 368. See also 1 Atk. 369. See also 1 Atk. 370. See also 1 Atk. 371. See also 1 Atk. 372. See also 1 Atk. 373. See also 1 Atk. 374. See also 1 Atk. 375. See also 1 Atk. 376. See also 1 Atk. 377. See also 1 Atk. 378. See also 1 Atk. 379. See also 1 Atk. 380. See also 1 Atk. 381. See also 1 Atk. 382. See also 1 Atk. 383. See also 1 Atk. 384. See also 1 Atk. 385. See also 1 Atk. 386. See also 1 Atk. 387. See also 1 Atk. 388. See also 1 Atk. 389. See also 1 Atk. 390. See also 1 Atk. 391. See also 1 Atk. 392. See also 1 Atk. 393. See also 1 Atk. 394. See also 1 Atk. 395. See also 1 Atk. 396. See also 1 Atk. 397. See also 1 Atk. 398. See also 1 Atk. 399. See also 1 Atk. 400.

SECT. 21. Twelfth, That it is not material whether the payment both of the principal and also of the usurious interest be secured by the same (a) or by different conveyances, but that all writings whatsoever for the strengthening such a contract, are void.

SECT. 22. Thirteenth, That a contract referring to the lender a greater advantage than is allowed by the statute, is equally

(e) C. Jac. 440
Dowp. 795.
Doug. 223.
Noy 151.
3 Will. 250.
2 Blac. 792.
Ellz. 23.

3 Keble 142.
Con No. 2.

1 And. 49.
1 Sil. 285.
3 Modern 35.
1 Noble 629.
New 143.
Cro. Jan. 442.
Vide C. Car.
501.
Prevalence.
2 Vm. 81.
Lutw. 403.
Co. En. 168.

Clift 185. Bro. V. M. 255. Jones 413. Cowp. 72.

(f) r Leona
96, 97.

(75) The time also is essential, and must be exactly laid, but if it is the true time it is sufficient if laid under a misnomer. Cowper 114. Therefore on a draft dated the 14th, but not filed till the 16th, and the only was laid on the 14th, it was held bad. So also the time must be precisely proved. Therefore where the time of payment was laid to be on a particular day, and it appeared that the time of payment was two years it was held a fatal variance, for the contract must be proved as it is laid. Cowper 671.

1 Leon 128,
149.

Handrefs 331.
Co. 1. 6. b.
2 Roll 685.
2 R 471. 191.
b. 2. c. 46. i.

Verf. 49.
Suk. 283.

827

1 Leon. 95. 96. *Sett.* 28. Nineteenth, That an information for an usurious contract on a loan of money, cannot be supported by evidence of such a contract on a bargain concerning ware sold.
 1 Surange 1243. 1043.
 1 Wilton 286.
 Vide 1 Modern
 174. whether an indictment will lie on 12 Ann. also Strange 816. Ld. Ray. 1144. 2 Salk. 680.
 And whether the prosecutor may compound. Barnes 118.

The plaintiff may reply *quod non corrupte agreeatum fuit. Quod licite bargainizavit* with a traverse of the corrupt agreement. Cl. Aff. 334. So on a note, the plaintiff may reply, that the note was given for a just debt; *absque hoc* that is agreed *modo & forma*, as the defendant pleads. Hardy Cases 287.

On a bill to set aside an usurious contract the defendant may demur to the discovery of what interest he agreed to take, because he cannot set that forth without disclosing the very interest he has taken. 2 Atk. 393.

The bill may borrow money at more than 5 per cent.

† *Sett.* 29. It is enacted by 3 Geo. I. c. 8. s. 39. "That the governor and company of the Bank of England shall have authority to borrow or take up money upon any contracts, bills, bonds, or obligations, under their common seal, or upon credit of their capital stock or otherwise for any time or to be paid upon demand and at such rate of interest as they shall think fit although the same shall happen to exceed the rate of interest allowed by law, and to give such security to the lenders as they shall approve."

† *Sett.* 30. And by 14 Geo. 3. c. 79. which was made to explain the 12 Ann before recited, it is further enacted, "That all mortgages and securities made and executed in Great Britain or of concerning any lands, tenements, hereditaments, slaves, cattle, or other things lying or being in any of the colonies, plantations or dominions of the *West Indies*, or any estate or interest therein to any of the king's subjects, for securing the re-payment of the sum of money thereon respectively really and *bona fide* advanced and lent with interest for the same; and all securities for the same; and all transfers and assignments of the same executed in Great Britain shall be good and valid; and that none shall be liable to the penalties of 12 Ann by receiving or taking interest for the money really advanced on such mortgage, security, bond, covenant, transfer and assignment at the rate of interest allowed and established by the law of the place where the mortgaged premises shall lie or are, and by par. 2. if the premises shall lie in Ireland, interest may be taken on securities executed as aforesaid not exceeding six per cent. per annum."

CHAPTER THE EIGHTY-THIRD.

OF MAINTENANCE.

MAINTENANCE is commonly taken in an ill sense, and in general seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right, and is said to be two-fold :

Sec. 2. First, *Ruralis*, or in the country ; as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty, or where one stirs up quarrels, and suits in the country, in relation to matters wherein he is no way concerned : And this kind of maintenance is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not, but is said not to be actionable.

Sec. 3. Secondly, *Curialis*, or in a court of justice, where one officiously intermeddles in a suit depending in any such court which no way belongs to him, by assisting either party with money or otherwise, in the prosecution or defence of any such suit.

Of this second kind of maintenance there seem to be three species : First, where one maintains another without any contract to have part of the thing in suit, which generally goes under the common name of Maintenance. Secondly, where one maintains one side, to have part of the thing in suit, which is called Champerty. Thirdly, where one laboureth a jury, which is called Embracery.

For the better understanding of the first of the abovementioned species, I shall examine : First, what shall be said to amount to an act of maintenance. Secondly, in what respects some such acts may be justified. Thirdly, how far offences of this kind are restrained by the common law. Fourthly, how far by statute.

Sec. 4. As to the first point, it seemeth clear, That whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expence of the suit, may properly be said to be guilty of an act of maintenance,

(a) 22 H. 6. 7. nance, as it seems to be taken for granted in the (a) books cited in the margin.
 12.
 23 H. 6. 25, 26.
 9 E. 4. 32.
 21 H. 7. 4. 6 E. 4. 1. 10 E. 4. 3. 31 H. 6. 9. B. Maint. 7. 14. 17. 20. 24. 43. 44.
 52. 2 R. Abr. 118. 6 Mo. D. 2. Rol. 77.

Sec. 5. Also it is said, That not only he who lays out his money to assist another in his cause, but also that he who by his friendship or interest saves him that expence which he might otherwise be put to, or but endeavours to do, is also guilty of maintenance; as where; (b) one persuades, or but endeavours to persuade a man, to be of counsel for another *grabs*.
 (b) 28 H. 6. 7.
 12.
 34 H. 6. 25.
 9 E. 3. 33.
 Mann. 6, 7, 22.

Sec. 6. Also it is said, That all such persons may properly be called maintainers, who give, or but endeavour to give, any other kind of assistance to either of the parties, in the management of the suit depending between them: as (c) by opening the evidence to the jury; or by (d) giving evidence officiously without being called upon to do it; or by speaking in the cause as (e) one of counsel with the party; or by (f) retaining an attorney for him; or (g) perhaps for barely going along with him to enquire for a person learned in the law.
 (c) 22 H. 6. 5.
 Mann. 14.
 C. 117.
 (d) 28 H. 6. 6.
 11 H. 6. 41.
 Mann. 5, 51.
 Mann. 10.
 2 R. Abr. 118.
 (e) Hct. 75, 79.
 (f) 1 R. Abr. 593. (g) 19 E. 4. 3. 12 E. 4. 14. Hct. 79.

Sec. 7. Also it hath been said, That those shall come under the like notion, who give any public countenance to another in relation to any such suit; as where one of great power and interest says (h) publicly, that he will spend twenty pounds on one side, or that he will give twenty pounds to labour the jury, whether in truth he spend one penny or not; or where such a person (i) comes to the bar with one of the parties, and stands by him while his cause is tried, whether he say any thing or not; for such kinds of practices do not only tend to discourage the other party from going on in his cause, but also to intimidate juries from doing their duty. But it seems, that a bare (k) promise to maintain another, is not in itself maintenance, unless it be either in respect of the public manner in which, or the power of the person by whom, it is made.
 (h) 22 H. 6. 5.
 Mann. 14.
 Mann. 3.
 (i) 22 H. 6. 5.
 11 H. 6. 41.
 19 E. 4. 3.
 Mann. 51.
 (k) 9 H. 7. 18.
 B. Champ. 9.

Sec. 8. Also it is said to be as much maintenance for a (j) juror, as for any other person, to solicit a judge to give judgment according to the verdict, because after a juror has given his verdict, he has nothing more to do: But it is said to be
 (j) 3 Mann. 46.
 12 E. 4. 3.
 6 Mo. D. 2.

no maintenance for a juror to exhort his companions to join with him in giving such a verdict as seems to him to be right.

Sec. 9. However it seems clear, (*m*) That a man is in no danger of being judged guilty of an act of maintenance, for giving another friendly advice, what action is proper for him to bring for the recovery of a certain debt, or what method it is safest to take to free him from such an arrest; or what counsellor or attorney is likely to do his business most effectually; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blame-worthy, to come under the notion of maintenance, which always seems to imply a contentious and over-busy intermeddling in other mens matters, in which respect it is so highly criminal. Yet it is said, that a man of great power not learned in the law, may be guilty of maintenance, by telling another who asks his advice, that he has a good title.

(*m*) 12 E. 4. 14.
19 E. 4. 3.
22 H. 6. 5.
B. Main. 17.
3 R. Abr. 118.
2 Inst. 564.
Moor 6.
F. Main. 28.
2 Roll. 181.
Co. Litt. 364.
2 Leon. 43.

Sec. 10. Also it hath been said, that no one can be guilty of maintenance, in respect of any money given by him to another before any suit is actually commenced; yet if it plainly appear, that it was given merely with a design to assist him in the prosecution or defence of an intended suit, which afterwards is actually brought; surely it cannot but be as great a misdemeanour in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit, though perhaps it may not in strictness come under the notion of maintenance.

3 H. 6. 54.
F. Main. 18.
B. Main. 1.
If a mortgagee
not a party in
the suit, ad-
vances money
to support the
title it is not
maintenance.
3 P. W. 375.

Sec. 11. However it is certain, That one may as properly be said to be guilty of maintenance, within the meaning of the words *ad hoc manu tenet*, in an action of maintenance, for supporting another after judgment, as for doing it hanging the plea; because the party grieved may be discouraged thereby from bringing a writ of error or attaint.

47 E. 3. 10.
B. Champ. 2.

As to the second point, *viz.* In what respects some acts of this kind may be justified, I shall consider the following particulars: First, how far they are justifiable in respect of an interest in the thing in variance. Secondly, how far in respect of kindred or affinity. Thirdly, how far in respect of other relations. Fourthly, how far in respect of charity. Fifthly, how far in respect of the profession of the law.

Sec.

Sec. 12. As to the first of these particulars, *viz.* How far, some acts of this kind are justifiable in respect of an interest in the thing in variance, it seemeth to be clearly agreed, that if (a) a tenant in tail, or for life, be impleaded, he in remainder or reversion may lawfully maintain the defence of the suit with his own money: And upon the like ground it seems to be clear, that if in an action of trespass, &c. brought by or against a (b) lessee for years, the inheritance come into question, the lessor may lawfully maintain his lessee, and give (c) evidence to prove the inheritance in himself; for though the judgment which may be given against the lessee cannot directly bind his inheritance, yet the verdict may be a prejudice to his title, being given on a supposal of his not having a good one: also it hath been admitted as clear law, that if one seised in fee of certain land, bring an action of trespass *quare clausum fregit*, and then alien the land, and afterwards in the trial of the cause it be questioned whether the inheritance at the time of the supposed trespass belonged to the plaintiff or defendant, the alienee may lawfully produce evidence to prove that the inheritance was in the plaintiff, because the plaintiff's title is now become his own.

Sec. 13. Also it hath been said, that not only those who have a certain interest, but also that those who have a bare contingency of such an interest in the lands in question, which possibly may never come *in esse*, may in like manner lawfully maintain another in an action concerning such lands; from whence it follows, That if I grant to B. that if my lessee for life shall die during my life, that then he shall have the land for ten years, and after my lessee be impleaded, B. may maintain him.

Sec. 14. And it hath been said, That not only those who have a contingency of such an interest, which it is in no man's power to bar them of, if the contingency happen, may justify such maintenance, but that those also shall have the same privilege, who by the act of God have the immediate possibility of such an interest, though it be in the power of another to deprive them of it; and therefore that an heir apparent, or the husband of such heir, may lawfully maintain the ancestor in an action concerning the inheritance of the land whereof he is seised in fee.

Sec. 15. But it is said, That the grantee of a reversion, before the late statute for amendment of the law which made all attornment needless, could not maintain the tenant of the land without attornment, because his possibility was wholly created by the act of the party, and could not be executed but by the voluntary attornment of the tenant, which there was

was no remedy to compel him to make by the common law; but perhaps the authority of this opinion may be questionable, especially if such grant were made for good consideration: For since those who have only an equitable interest in lands, may lawfully maintain others in actions relating to those lands, as shall more fully be shewn in the seventeenth section; and since the grantor in equity shall stand intrusted for the grantee after the grant, and the tenant may be enforced by a court of equity to attorn to him, I do not see any good reason why such grantee should be esteemed such a stranger to the land, that he may not lawfully defend an action concerning it, in the event whereof he is so nearly concerned.

Sec. 16. But it seems clear, that he who is bound to warrant lands, may lawfully maintain the tenant in the defence of his title, because he is bound by the warranty to render other lands to the value of those which shall be evicted.

11 H. 6. 41.
B. Main. 51.
2 R. Abr. 118.

Sec. 17. Also it seems to be agreed, that he who hath an equitable interest in lands or goods, or even in a chose in action, may lawfully maintain another in an action relating thereto; and therefore it seemeth to be clear, that a man may lawfully maintain (a) those who are infeoffed of lands in trust for him, in an action concerning those lands, and that if he sell them to another, the vendee shall have the same privilege; also it hath been (b) resolved, that where A. was bound as a surety for B. and B. thereupon made a deed of gift of certain sheep to A. in order to save him harmless from the said bond, with an implied trust that the sheep should be returned to B. if A. should not be damnified, and afterwards an action was brought against A. for the taking of sheep, B. might justify the maintaining of him in respect of the said trust: also it seemeth to be (c) certain, that the assignee of a bond, or other chose in action, being made over to him for good consideration, in satisfaction of a precedent debt, due bona fide to him, and not merely in consideration of the intended maintenance, may either maintain the obligee in an action brought by him for the debt, or commence an original action in his name, for he hath an equitable interest in the debt.

(a) 34 H. 6. 30.
15 H. 7. 2.
2 E. 4. 2.
B. Main. 19.
30.
(b) Noy 100.
Moor 620.
See 39 H. 6.
10. 6. 20.
F. Main. 14.

(c) 14 H. 6. 30.
15 H. 7.
Noy 52.
C. Eliz. 552.
1 Sid. 21.
B. Main. 9.

Sec. 18. Also it seemeth to be (d) agreed, that wherever any persons claim a common interest in the same thing, as in a way, church yard, or common, &c. by the same title, they may maintain one another in a suit relating to the same.

(d) 18 E. 2. 4.
B. Main. 47.
Hob. 92.
2 R. Abr. 118.
Noy 99.
Moor 562. 788.
2 Roll. 57.

Sec. 19. It is said, That he who is (e) bail for another, may take care to have his appearance recorded, but that he ought not to intermeddle any farther.

(e) 34 H. 6.
26.
14 H. 6. 6.
13 Ed. 4. 12.

Sec.

(a) 11 H. 6.
6 Ed. 4. 5.
14 H. 7. 2.
(b) 16 E. 4. 5.
1. M. n. 16.
(c) 21 H. 6.
15.
11 H. 6. 42. 42.
12 H. 6. 2.
10 Ed. 4. 32.
9 H. 6. 64.
6 Ed. 4. 32.
(d) 19 Ed. 4. 5.
2 Inst. 564.
(e) 21 H. 6. 16.
2 Inst. 564.
Vide sup. 14.

Sec. 20. As to the second of the said particulars, viz. How far some acts of this kind are justifiable in respect of kindred or affinity, it seems to be agreed, that whoever is in any way of kin or affinity to either of the parties, so long as the same (a) continues, or but related to him by being his (b) godfather, may lawfully (c) stand by him at the bar, and counsel and assist him, and also pray another to be of counsel to him, but that he cannot justify the laying out of any of his own (d) money in the cause, unless he be either (e) father, son, or heir apparent to the party, or the husband of such an heiress.

As to the third of the said particulars, viz. How far some acts of maintenance are justifiable in respect of other relations, I shall consider. 1. How far a lord may maintain his tenant. 2. How far a tenant may maintain his lord. 3. How far a master may maintain his servant. 4. How far a servant may maintain his master. 5. How far one neighbour may maintain another.

(f) 11 H. 6. 20.
6. 40.
2 R. Abr. 117.
B. M. n. 30.
(g) 18 E. 4. 7.
B. M. n. 30.
(h) 9 H. 6. 64.
B. M. n. 3.
(i) 10 E. 6. 5.
(j) 10 E. 6. 5.
10 E. 6. 5.
11 H. 6. 42.
2 R. Abr. 117.
(k) 1. Main.
35.

Sec. 21. As to the first point it seems certain, that not only the (f) lord, but also the *cestui que use* of a feignory, may come with the tenant to a trial in an assize against him, and stand by him and assist him, and also pray the sheriff to return an indifferent jury: Also it seemeth, that the (g) lord of a town in an action brought against the inhabitants, wherein a right to a common burying-place, claimed by them, is brought into question, may maintain them in the defence of their right, by shewing authentic evidence thereof to the jury: And in some (h) books it is said generally, that the lord may maintain his tenant, without saying, how far he may do it; and I do not find it any where expressly holden, that the lord may justify laying out his own money in defence of his tenant's title; but it seemeth the better opinion, that he may as well justify it as any other of the abovementioned acts of (i) maintenance; for the lord, by accepting a man for his tenant, seemeth to take him under his immediate (k) protection; and inasmuch as the lands were originally derived from the lord, and he hath the continual benefit of the services due from them, the law in many cases of (l) common right, obliges him to warrant them unto his tenant, and where it doth not oblige him, surely it will at least permit him to do it; But it seems clear, that he cannot maintain him in respect of any lands not holden of him.

(m) 11 H. 6.
4.
2 R. Abr. 117.

Sec. 22. As to the second point, viz. How far a tenant may maintain his lord, it is said, that he may justify (m) coming with his lord, and standing with him at a trial; but I cannot

not find any thing more relating to this matter in any of the books.

Sec. 23. As to the third point, *viz.* How far a master may maintain his servant, it is said, that the master may go along with his (a) servant, or with his (b) chaplain, being retained to live in his house with him, in order to (c) retain counsel, and that he may pray one to be of counsel for him, and also that he may go with him to the (d) trial and stand with him and aid him while the cause is tried, but ought not to speak in the court in favour of his cause. Also it is said, that if my servant be arrested in an action of (e) debt, I may assist him with money in order to keep him out of prison, that I may have the benefit of his service: But it is said that the master, in real actions, cannot justify laying out money for his servant, unless he hath some of his wages in his hand; which, if the servant be willing, the master may safely lay out on his behalf.

(a) Het. 79.
(b) 19 H. 6. 30.
(c) 28 H. 6. 7.
12 b. 13.
34 H. 6. 25. 26.
B. Main. 6. 14.
F. Main. 20.
Con. F. Main.
13.
(d) 19 H. 6.
20.
11 H. 6. 42.
2 R. Ab. 116.
Het. 79.
(e) 21 H. 7. 40.
Moor 814.
B. Main. 24.
31 H. 6. 9.
19 Ed. 4. 3.
2 R. Ab. 116.
Het. 79.
E. Main. 44. 52.

Sec. 24. As to the fourth point, *viz.* How far a servant may maintain his master, it seemeth clear, that a person generally retained by another as his servant to do all manner of services, and not for a (f) particular occasion only, may justify (g) riding about to speed his business, and going to (h) counsel in his behalf, and shewing his evidences to the counsel or to the jury, and (i) standing by him at a trial between him and another; but it is certain, that he cannot lawfully lay out any of his own (k) money to assist the master in his suit.

(f) 39 H. 6. 5.
Con. Keil. 20.
(g) 19 b. 4. 3.
(h) 10 H. 6. 13.
(i) 11 H. 6. 42.
(k) 3 H. 6. 53.
54.
11 H. 6. 10. 11.

Sec. 25. As to the fifth point, *viz.* How far one neighbour may assist another, it seems clear, that a man may lawfully go with his (l) neighbour to inquire for a person learned in law, but that (m) he ought not to give him any money towards carrying on his suit.

19 E. 4. 7.
12 Ed. 4. 14.
(l) 10 E. 4. 7.
2 R. Ab. 118.

Sec. 26. As to the fourth instance wherein some acts of this kind are justifiable, *viz.* That relating to charity, it seems to be (n) agreed, that any one may lawfully give money to a poor man to enable him to carry on his suit. Also it hath been adjudged, that any one may safely go with a (n) foreigner who cannot speak English to a counsellor, and inform him of his case.

(n) 11 H. 6. 26.
9 H. 6. 44.
21 b. 6. 64.
27 H. 6. 14.
B. Main. 14.
1. 2. 3. 4. 5.
24 H. 6. 25.
25 H. 6. 25.
B. Main. 7.

As to the fifth instance wherein some acts of this kind may be justified, *viz.* that relating to the profession of the law, I shall consider, First, how far they are justifiable in a counsellor. Secondly, how far in an attorney.

Sec.

- (a) 1 H. 6. 10.
11.
2 R. Abr. 116.
2 Inst. 564.
(b) F. Main. 8.
22 H. 6. 6.

Sett. 27. As to the first point, there is no doubt but that a (a) counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but it is certain, that he can no more justify (b) giving him money to maintain his suit, or threatening a juror, than any other person.

- (c) 13 H. 4. 16.
Keilw. 50.
Hob. 117.
2 Inst. 564.
2 R. Abr. 116.
F. Main. 21.
(d) 3 Mod. 98.
Vide 2 Danv.
437, 12, 13, 14.
Winch. 52.
1 Jon. 208.
C. Car. 159.
154.
Conn. C. Elz.
455, 459, 760.
Moort 366.
2 R. Abr. 114,
115.
(e) 2 R. Abr.
114.

Sett. 28. As to the second point, there is no doubt but that an attorney may (c) lawfully prosecute or defend an action in the court wherein he is an allowed attorney, in the behalf of any one by whom he shall be specially retained, and that he may assist his client, by laying out his own money for him to be repaid again, and also may maintain an action against him for the same by virtue of such a retainer, without any special promise. And it is said, also, that attorneys may justify such maintenance in other courts, wherein they are not (d) allowed attorneys, but that they cannot have an action for the money so laid out without a special promise, and that they are more justified by a general (e) retainer to prosecute for another all his causes, than if they were not retained at all; and it is certain that they ought not to carry on a cause for another at their own expence, with a promise never to expect a repayment. And it seems justly questionable, whether solicitors who are no attorneys, can in any case justify the laying out their money in another's suit.

- 2 R. Abr. 115.
Winch. 52.
1 Inst. 214.

Sett. 29. However it is certain, that no counsellor or attorney can justify the using any deceitful practice, in maintenance of a client's cause, and that they are liable to be severely punished for all misdemeanors of this kind, not only, by the common law, but also by statute; for it is enacted by Westminster 1. c. 29. "That if any serjeant, pleader, or other, do any manner of disseit or collusion in the king's court, or consent unto it, in disseit of the court, or to beguile the court or the party, and thereof be attained, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that court for any man. And if he be no pleader, he shall be imprisoned in like manner by the space of a year and a day at the least. And if the trespass require greater punishment, it shall be at the king's pleasure."

- 1: L. 4. 3.
B. D. 28.

Sett. 30. In the construction of this statute the following points have been holden. First, That counsellors, &c. who are not sworn, are as much within the meaning of it as serjeants, &c. who are sworn.

- 2 Inst. 215, 216.
D. C. 249.
1 Inst. 215.
F. N. B. 11.

Sett. 31. Secondly, That all fraud and falsehood, tending to impose upon or abuse the justice of the king's courts, are within the purview of it, as in the following instances:

Sett.

Sec. 32. First, Where an attorney sues out an *habere facias seisinam*, falsely reciting a recovery in a real action, where in truth there was no recovery at all, and by colour thereof puts the supposed tenant in the action out of his freehold.

Sec. 33. Secondly where one brings a *præcipe* against a poor man, knowing that he had nothing in the land, on purpose to get the possession from the true tenant.

Sec. 34. Thirdly, where one procures an attorney to appear for a man, and confess judgment without any warrant.

Sec. 35. Fourthly, where one pleads a false plea, known to be utterly groundless, and invented merely with a design to delay justice, and abuse the court; and therefore it is said, that it is a client's desire his attorney to plead such a plea, the attorney ought to enter upon the roll, *non sum veraciter informatus, idcirco nihil agit.*

Sec. 36. As to the third general point of this chapter. How far offences of this kind are restrained by the common law? It seemeth, that all maintenance is strictly prohibited by the common law, as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said, that all offenders of this kind are not only liable to an (a) action of maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be (b) indicted as offenders against public justice, and adjudged thereupon to such fine and imprisonment, as shall be agreeable to the circumstances of the offence. Also it seemeth, that a court of record may commit a man for an (c) act of maintenance done in the face of the court.

(a) 11 H. 6. 11.
2 Inst. 208.
2 R. Abr. 214.
8 H. 5. 8.
(b) 2 R. Abr. 214.
2 Inst. 208, 212.
(c) Het. 79.

Sec. 37. As to the fourth general point of this chapter. How far offences of this kind are punished by the statute? It is enacted by 1 Edw. 3. c. 14. which was farther enforced by 20 Edw. c. 4. "That none of the King's ministers, nor no great man of the realm, by himself nor by other, by sending of letters, nor otherwise, nor none other great nor small, shall take upon them to maintain quarrels nor parts in the country, to the lett and disturbance of the common law."

Sec. 38. And it is farther enacted by 1 Rich. 2. c. 4. "That none of the King's counsellors, officers or servants, nor any other person within the realm of England, of whatever estate or condition they be, shall take or sustain any quarrel by maintenance, in the country or elsewhere, upon grievous pain, that is to say, the said counsellors and the king's

“ king’s great officers, upon a pain which shall be ordained by
 “ the king himself, by the advice of the lords of his realm;
 “ and other less officers and servants of the king’s as well in
 “ the exchequer, and all his other courts and places, as of his
 “ own meiny, upon pain to lose their offices and services, and
 “ to be imprisoned, and then to be ransomed at the king’s
 “ will, every of them according to their degree, estate, and de-
 “ sert: and all other persons through the realm, upon pain of
 “ imprisonment, and to be ransomed as aforesaid.”

P. Main. 24.

Secl. 39. In the construction of these statutes the following points have been holden: first, that maintenance of a suit in a court baron is as much within the purview thereof as maintenance in a court of record.

3 H. 6. 53, 54.
 H. Main. 1.
 F. Main. 18.

Secl. 40. Secondly, that *nul tiel record* is a good plea to an action of maintenance brought on these statutes; and therefore, that he who barely assists another in taking out an original, which never is returned, is not liable to any such action.

Fitz. Mainte-
 nance 17, 26.

Secl. 41. Thirdly, that it is not material, whether the plaintiff in an action on the said statutes were nonsuited, or recovered in the action wherein the maintenance is supposed.

Reg. 182. b.

Secl. 42. Also it is certain, that he who fears that another will maintain his adversary, may by way of prevention have an original writ grounded on the said statute prohibiting him so to do.

11 M. 2. 322.

Secl. 43. Also all persons are prohibited to give or receive any liveries or badges for maintenance, under severe penalties, by 1 Rich. 2. c. 7. 7 Hen. 4. c. 14. 13 Hen. 4. c. 3. 8 Hen. 6. c. 4. and 8 Edw. 4. c. 2.

Secl. 44. And it is further enacted by 32 Hen. 8. c. 6.
 “ That no person whatsoever shall unlawfully maintain, or
 “ cause or procure any unlawful maintenance in any action,
 “ demand, suit or complaint in any of the king’s courts of
 “ the chancery, *Witehall*, or elsewhere, where any person
 “ shall have authority by virtue of the king’s commission, pa-
 “ tent or writ, to hold plea of lands, or to examine, hear or de-
 “ termine any title of lands, or any matter of witnesses, con-
 “ cerning the title, right, or interest of any lands, tenements,
 “ or hereditaments; and also that no person whatsoever do un-
 “ lawfully retain, for maintenance of any suit or plea, any per-
 “ son or persons, or embrace any freeholders or jurors, or sub-
 “ orn any witness by letters, rewards, promises, or any other
 “ sinister labour or means, for to maintain any matter or cause,
 “ or to the disturbance or hindrance of justice, or to the pro-
 “ curement,

“curement, by occasion of any manner of perjury by false verdict
 “or otherwise, in any manner of courts aforesaid, upon pain
 “to forfeit for every such offence ten pounds; the one moi-
 “ety thereof unto the king, and the other moiety to him that
 “will sue for the same by action of debt, &c.

Sec. 45. It seemeth that in an information on this statute Sail 41, 42.
 it is not sufficient to say, that the defendant maintained the
 party, without adding that he did it unlawfully.

Sec. 46. Also it is said to have been adjudged; That Nov. 68.
 maintenance of a suit in a spiritual court, is not Co. Lit. 294. within this
 nor any of the other abovementioned statutes concerning
 maintenance.

Sec. 47. Also it hath been holden, that in an information Sail 41, 42.
 on this statute, it is necessary to shew that a plea was depend-
 ing, and therefore that it is not sufficient to say that a bill was
 exhibited.

CHAPTER THE EIGHTY-FOURTH.

OF CHAMPERTY.

AN'D now we are come to the second species of mainte- 2 Inst. 268.
 nance, called champerty, which is the unlawful mainte- Co. Lit. 308.
 nance of a suit in consideration of some bargain to have part
 of the thing in dispute, or some profit out of it.

Sec. 2. Having shewn in the precedent chapter what shall
 amount to an act of maintenance, and how far all maintenance
 in general, and consequently champerty, is punishable by the
 common law; I shall only take notice in this place, how far
 this offence in particular is restrained by statute, and to that
 end shall set down in order the several statutes relating to it,
 and shew in what manner they have been expounded.

Sec. 3. And first, it is enacted by the statute of Westmin- 1 R. 2. 14.
 ster 1. c. 25. “That no officers of the king by themselves
 “nor by other, shall maintain pleas, suits, or matters hang-
 “ing in the king’s courts, for lands, tenements, or other
 “things, for to have part or profit thereof by covenant made
 “between them: and he that doth, shall be punished at the
 “king’s pleasure.”

2 Inst. 268.

Sec. 4. In the construction of the statute these following opinions have been holden. First, that by the king's courts, therein mentioned, are intended only his courts of record.

F. N. B. 172.

2 Inst. 269. 563.

Sec. 5. Secondly, that under the word "covenant," which in a strict sense signifieth only an agreement by deed, all kinds of promises and contracts of this kind are included, whether they be made by writing or parol.

4th Affiz. 5.

47 E. 3. 9.

Sec. 6. Thirdly, that maintenance in personal actions, ~~are~~ have part of the debt or damages, is as much within this statute, as maintenance in real actions for a part of the land.

F. N. B. 172.

2 Inst. 269.

47 E. 3. 9.

4th Affiz. 5.

9 H. 7. 18.

F. Champ. 4.

Sec. 7. Fourthly, that maintenance in consideration of a rent granted out of land in variance, is within this statute, but that rent granted out of other lands is no way within the purview of it.

B. Champ. 2.

Sec. 8. Fifthly, that it hath been holden not to be material, whether he who brings a writ of champerty, did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not.

6th F. 4. 53.

2 Inst. 269.

47 E. 3. 9.

4th Affiz. 5.

9 H. 7. 18.

F. Champ. 4.

Sec. 9. Sixthly. That the (a) maintenance of the tenant or defendant is as much within the meaning of the statute, as the maintenance of a defendant or plaintiff.

6th F. 4. 53.

2 Inst. 269.

47 E. 3. 9.

4th Affiz. 5.

9 H. 7. 18.

F. Champ. 4.

Sec. 10. Seventhly, that (1) such grants only of part of the thing in suit, which are made merely in consideration of the maintenance are within the meaning of the statute, and not such as are made in consideration of a precedent interest, which is agreed to be satisfied with the thing in demand when recovered.

Sec. 11. And it is further enacted by the statute of Westminster 2. c. 49. "That the chancellor, treasurer, justices, nor any of the king's counsel, no clerk of the chancery, nor of the exchequer, nor any justice or other officer, nor any of the king's house, clerk, nor lay, shall not receive any church, nor advowson of a church, land nor tenement in fee, by gift or by purchase, or to farm, nor by champerty, nor otherwise, so long as the thing is in plea before the king, or before any of his officers, nor shall take no reward thereof. And that he that doth contrary to this act, either himself, or by another, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth, as he that doth sell."

Sec.

render, as hath been more fully shewn in the precedent chapter, surely *a fortiori* he may do it after the surrender.

(1) 2 Inl. c. 64.
1. N. E. 172.

Sect. 19. Fifthly, that no (*a*) conveyance, or promise thereon, relating to lands in suit, made by a father to his son, or by any ancestor to his heir apparent, is within the statute, since it only gives them the greater encouragement to do what by nature they are bound to do.

(2) 11 H. 7. 17.
In C. 10 p. 3.

Sect. 20. That the (*b*) giving of part of the land in suit, after the end of it, to a counsellor for his wages, is not within the meaning of it, if it evidently appears, that there was no kind of precedent bargain relating to such gift; but it seems (*c*) dangerous to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty.

(3) 21 R. 5. 4.

Vide 2b. p. 322.

† *Sect. 21.* And it is enacted by 31 Eliz. c. 5. "that the office of champerty may be laid in any county at the pleasure of the informer."

CHAPTER THE EIGHTY-FIFTH.

OF EMBRACERY.

IN OR the better understanding of the nature of embracery, I shall consider, first, What kind of maintenance comes under the notion of embracery. Secondly, What acts of this nature are altogether unlawful. Thirdly, In what circumstances some kinds of them may be lawful. Fourthly, How this offence is restrained by the common law. Fifthly, How far by statute.

(1) 11 H. 7.
C. 10 p. 3.
M. 172.
4 Inl. c. 64.
(2) 21 H. 7.
22 H. 7.
37 H. 6.
H. 7. 17.
C. 10 p. 3.
M. 172.

Sect. 1. As to the first point it seems clear, that (*a*) any attempt whatsoever to corrupt, or influence, or influence a jury, or any way to incline them to be more favourable to the one side than to the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery, (*b*) whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.

(3) 11 H. 7.
10 H. 7.
C. 10 p. 3.
C. 10 p. 3.
37 H. 6.

Sect. 2. (*c*) And the law so far abhors all corruption of this kind that it prohibits every thing which has the least tendency to it, what specious pretence soever it may be covered with, and

and therefore it will not suffer a mere stranger, so much as to labour a juror to appear and act according to his conscience.

Sec. 3. Also it is said, that generally the giving of money to a juror (*a*) after the verdict, without any precedent contract in relation to it, is an offence favouring of the nature of embracery; because if such practices were allowable, it would be easy to evade the law, by giving jurors secret intimations of such an intended reward for their service, which might be of as bad consequence as the giving of money before-hand. But it seems clear, that the giving of jurors such a reasonable recompence, as is usually allowed them for their expences in travelling, &c. and which may fairly be expected by them from either side that shall prevail, is no way criminal, because if no such allowance were to be expected, it would be often difficult to prevail with persons to serve on a jury at their own charge; and therefore by experience it hath been found necessary to permit the parties to give jurors some amends for their charges.

Sec. 4. It hath been adjudged, that the bare (*b*) giving of money to another to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually distributed or not; also it is (*c*) clear, that it is as criminal in a juror, as in any other person, to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever, except only by arguments from the evidence which was produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict, are high offences of this nature; as where persons by (*d*) indirect means procure themselves or others, to be sworn on a *take* in order to serve one side.

Sec. 5. As to the second point, *viz.* What acts of this kind are altogether unlawful. It seems clear, that neither the party himself, nor his counsel, nor attorney, nor any person whatsoever, can justify any indirect practices of influencing a jury, either by giving (*e*) or promising them money, or (*f*) menacing them, or, (*g*) instructing them in the cause before-hand, &c.

Sec. 6. As to the third point, *viz.* In what circumstances some acts of this nature may be lawful. It seemeth clear, that any person who may justify any other act of maintenance, may safely labour a juror to (*h*) appear and give a verdict according to his conscience, but that no other person can justify

(c) 30 Aff. 19.
B. Dec. Tan. 14.

(b) 12 H. 6. 5.
20 H. 6. 7. 12.
31 H. 6. 8. 12.
B. 10. 6. 14.
(c) 11 H. 6. 5.
12 H. 6. 8.
B. 10. 6. 14.
32.

(d) 1 S. and.
321.

(e) 13 H. 4. 16.
17.
18 H. 6. 16.
20 H. 6. 119.
6. 3.
(f) 19 H. 6.
31.
11 H. 6. 17.
12 H. 6. 23.
13 H. 6. 23.

Co. Litt. 321. B. 10. 323.

(h) 10 H. 6. 18.
10 H. 6. 187.
10 H. 6. 187.
10 H. 6. 187.
10 H. 6. 187.

intermeddling so far, and that no one whatsoever can justify the labouring a juror (a) not to appear.

Sec. 7. As to the fourth point, *viz.* How far offences of this kind are restrained by the common law, there can be no doubt but that they subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law. Also it is evident, that if an act of embracery were not known before the trial of a cause, so that the party to whose prejudice it was intended, had no opportunity to prevent the ill effects of it, by challenging the juror who was practised upon, it will be a good ground to move the court to set aside the verdict.

Sec. 8. As to the fifth point, *viz.* How far offences of this kind are restrained by statute. It is enacted by 5 L. 3. c. 10. “that if any juror, in assizes, juries or inquests, take
“ of the one party or of the other, and be thereof convicted, that
“ hereafter he shall not be put in any assize, jury, or inquest,
“ quills, and nevertheless he shall be committed to prison,
“ and further ransomed at the king’s will. And the justices
“ before whom such assizes, juries, and inquests shall pass,
“ shall have power to enquire and determine according to this
“ statute.”

Sec. 9. And it is farther enacted by 34 L. 3. c. 8. “That
“ in every plea, whereof the inquest or assize doth pass, if
“ any of the parties will sue against any of the jurors, that
“ they have taken of his adversary or of him, for to give
“ their verdict, he shall be heard, and shall have his plaint by
“ bill presented before the justices, before whom they did
“ swear, and that the juror be put to answer without any delay;
“ and if they plead to the country, the inquest shall be
“ taken main count. And if any man other than the party
“ will sue for the king against the juror, it shall be heard and
“ determined as before is said. And if the juror be attainted at
“ the request of other than the party, and make his fine, the party
“ in that behalf shall have half the fine; and that the parties to
“ the plea, shall recover their damages by the assentment of
“ the inquest. And that the juror so attainted have the prison
“ of one year, which imprisonment the king granteth, that it
“ shall not be pardoned for any fine; and if the party will
“ sue by writ, before other justices, he shall have the suit in
“ the form aforesaid.”

Sec. 10. And it is further enacted by 38 Edw. 3. c. 12.
“ That if any jurors in assizes sworn, and other inquests to
“ be taken between the king and party, or party and party,
“ do any thing take by them or other, of the party, plaintiff,
“ or

"or defendant, to give their verdict, and thereof be attainted
 "by process contained in the said statute of 34 Edw. 3. be
 "it at the suit of the party that will sue for himself, or for the
 "king, or any other person, every of the said jurors shall pay
 "ten times as much as he hath taken. And that he that will
 "sue shall have the one half, and the king the other half. And
 "that all the embracors to bring or procure such inque^r in
 "the country to take gain or profit shall be punished in the
 "same manner and form as the jurors. And if the juror or
 "embracor so attainted, have not wherewith to make gree in
 "the manner aforesaid, he shall have the imprisonment of one
 "year, and the intent of the king, of great men, and of the
 "commonalty, that in justice nor other manner shall enquire
 "of office, upon any of the points of this article, but only at
 "the suit of the party, or of other, as as afore is said." See
 a 32 Hen. 8. c. 7. sec 3. 6.

11. In the construction of these statutes the follow-
 ing rules have been holden: First, That an action of *deceit*
 is not lying founded on an offence supposed to have been
 committed in some former action appearing upon record, it
 being sufficient to shew, either that there is no (a) such re-
 cord in the court, or that there is not any such (b) record by which
 it can appear that the juror was sworn, and that it is a good
 plea in abatement, that there is a variance
 in the bill record in the declaration in the present
 action; yet it is said, that it is not necessary to (c) shew the
 whole record in certain, but only so much of it as conveys
 the plaintiff to his action.

(a) 5 El. 4. 3.
 B. Dec. Tant. 2.
 11.
 (b) 7 H. 6. 31.
 B. Dec. Tant. 13.
 (c) 9 H. 6. 1.
 B. Dec. Tant. 1.
 (d) 34 H. 6. 4.

Sec. 12. Secondly, That it is not (e) sufficient to shew
 that the defendants took money, in order to embrace a jury,
 without shewing also that they actually disposed of it accord-
 ingly.

(e) 3 H. 6. 21.
 F. N. B. 171.

Sec. 13. Thirdly, that the (f) plaintiff must shew in
 certain how much was received, or otherwise the court will
 not know for what sum to give judgment.

(f) Pl. Com.
 25.

Sec. 14. Fourthly, That the giving of money to a juror
 (g) after the verdict is not within the statute, unless there were
 some precedent contract relating to it.

(g) 19 Aff. 19.
 B. Dec. Tant. 14.

Sec. 15. Fifthly, That it is not (h) material whether the
 jurors gave any verdict or not, or if they did give one, whe-
 ther it were true or false.

(h) 21 H. 6. 31.
 3 H. 6. 31.
 B. Dec. Tant. 10.
 171. N. B. 11.
 Co. L. 269.
 Dyer 95.

20. 11. 3. 2.
21. 11. 6. 3.
11. 11. 10. 3. 4.
11. 11. 17. 1.
11. 11. 25. 2.
21. 11. 6. 2. 3.

Sec. 16. Sixthly, That all the jurors and embracers may be joined in one action, notwithstanding they severally received different sums, because all was received in order to give the same verdict, which could not but be the entire act of all the jurors. But it seems, that each defendant ought to plead severally, that he did not take money in the manner as the plaintiff hath declared.

(1) 11. 11. 1. 1.
11. 11. 1. 4. 2.

Sec. 17. Seventhly, That the (a) defendants ought not to plead generally not guilty, but that they ought specially to deny the taking of the money, &c.

(1) 11. 11. 1. 15.
4. 11. 1. 3. 3.
11. 11. 1. 1. 5. 7.

Sec. 18. Eighthly, That the plaintiff shall be paid the moiety of the money due to him on a judgment in *decies tantum* before the king, because the king's moiety is not due as a debt but as a fine; and wherever the king is intitled to a fine from the suit of a subject, the plaintiff shall first be satisfied.

(1) 11. 11. 1. 1.
4. 11. 1. 1. 1.
11. 11. 1. 1. 1. 2.
11. 11. 1. 1. 1.

Sec. 19. Ninthly, That the husband (c) alone may bring a *decies tantum*, for an embracery in a former action brought by him and his wife, because by a *decies tantum* money only is to be recovered wherein the wife can claim no share.

(1) 11. 11. 1. 3. 3.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 2.

Sec. 20. Tenthly, That he who buys land to maintain a suit at a lower price than it is known to be worth, is as much within the statute, for so much as the (d) land is worth more than he gave, as if he had received it in money.

(1) 11. 11. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.

Sec. 21. Eleventhly, That this being a popular action may be barred by the (e) king's release, being made before any action brought, but that it cannot be barred by the release of the party grieved; and from the same ground also it follows, that the party grieved needs not in such action declare of any damages done to him by the embracery; but if he do, it is said that he (f) ought to lay them severally against each defendant, or else that his writ shall abate, unless he will release them: but perhaps there may be good reason to question this opinion, for why may not the damages be as well recovered, as the action jointly laid against all the defendants.

(1) 11. 11. 1. 1. 1. 1.
4. 11. 1. 1. 1. 1.
11. 11. 1. 1. 1. 1.

Sec. 22. Twelfthly, That no (g) process of outlawry lies in this action, but only a *capias* or distress infinite, upon a *nila* returned, and that such distress ought to be of the lands which the defendants had at the time of the writ of *decies tantum* purchased, and not of those which they had at the time of the request; and that no *capias* (h) into a foreign county lies against the jurors, because it shall be presumed that they are in the country when they were returned on the jury; but clearly this reason: can no way be extended to the embracers: and perhaps it may be overfavourable to carry it so far in fe-

lation.

lation to the jurors, especially since the distress infinite can only affect the lands which they had at the time of the *decies tantum*, before which they may possibly have sold those which they had at the return of the *venire*; and why should not the sheriff's present return that the defendants have nothing in the county, over-balance the presumption chiefly grounded on the former return, with which the present is not inconsistent, being made at a subsequent time.

Vide 6 E. 4.

11. 3.

2 R. Abr. 277.

CHAPTER THE EIGHTY-SIXTH.

OF THE OFFENCE OF BUYING OR SELLING A PRETENDED TITLE.

FOR the better understanding the offence of buying or selling a pretended title, I shall consider: how it is restrained by common law. And, how by statute.

§. 1. As to the first point. It seemeth to be a high offence at common law, to buy, or sell, any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under-rate. And it seemeth not to be material whether the title to sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression, by giving opportunities to great men to purchase the disputed titles or others, to the great grievance of the adverse parties, who may often be unable or discouraged to defend their titles against such powerful persons, which perhaps they might safely enough maintain against their proper adversary.

Moose 751.
Hibut 115.
Plowden 80.
80.

§. 2. As to the second point, *viz.* How far offences of this kind are restrained by statute. It is recited by 1 Rich. 2. c. 9. "That many persons having true title to lands, and also in personal actions were wrongfully delayed of their rights and actions, by means that the defendants did commonly make gifts and feoffments of their lands in debate, and of their goods, to lords, and other great men, against whom the said pursuants for menace that was made to them, neither could nor durst make their pursuits: and also that many persons often times used to disservice others, and anon after

after such disseisin to make divers feoffments, sometimes to lords and other great men to have maintenance, and sometimes to persons unknown, to the intent to delay the said disseisees, &c. And it is thereupon enacted, "that from thenceforth no gift, or feoffment, of lands, tenements, or goods, be made, by such fraud or maintenance; and that if any be in such wise made, they shall be holden for none and of no value; and that the said disseisees shall from thenceforth have their recovery against the first disseisor, as well of the lands and tenements, as of their double damages, without having regard to such alienations, so that the disseisees commence their suits within the year next after the disseisin done."

B. Feoffments
20. 1. 1. 1. 1.
Ch. Law. 179.

Sec. 3. In the construction of the statute it hath been holden: that feoffments of this kind are only void in respect of the disseisees, but that they are effectual between the feoffor and feoffee, &c.

And it is enacted by stat. 13. Ed. 1. c. 49. "that no person of the king's house shall buy any title whilst the thing is in dispute; on pain of both the buyer and seller being punished at the king's pleasure."

Le. Raym. 227.

Sec. 4. And it is further enacted by 32 H. 8. c. 9. "that no person or persons whatsoever shall bargain, buy, or sell, or by any ways or means, obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title, of any person or persons, in, or to any manors, lands, tenements, or hereditaments, but if such person or persons, which shall so bargain, sell, give, grant, covenant or promise the same, their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made; upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, tenements, or hereditaments so bargained, sold, promised, covenanted, or granted, contrary to the form of this act. And the buyer or taker thereof, knowing the same, to forfeit also the value of the said lands, tenements, or hereditaments so by him bought, or taken as is above said. The one half of the said forfeitures to be to the king; and the other half to the party that will sue for the same in any of the king's courts of record, by action of debt, bill, plaint, or information. In which action, bill, plaint, or information, no oath, protection, wager of law, nor injunction shall be allowed."

Sec. 5.

Stat. 5. But it is provided by the said statute, "that it shall be lawful to any person, being in lawful possession, by taking of the yearly farm, rents, or profits, of, or for any manors, lands, tenements, or hereditaments, to buy, obtain, get, or have by any reasonable way or means, the pretended right or title of any other person or persons, hereafter to be made to, of, or in such manors, lands, tenements, or hereditaments; whereof he or they shall so be in lawful possession, any thing in the said act contained to the contrary notwithstanding."

Stat. 6. And it is farther provided, "that the said statute shall not extend to charge any person with any of the above-mentioned penalties, except such person be sued for the offence within one year."

In the construction of this statute the following opinions have been holden :

Stat. 7. I. That it is not material whether any suit be depending concerning the lands contracted for, or not, whereas the statutes let forth in the precedent chapters extended only to contracts concerning lands which were actually in suit.

Flowd. 83.

Stat. 8. II. That in an action on this statute, the plaintiff need not recite it, because the judges are bound *ex officio* to take notice of it, being of a public nature; but that if he do recite it, he must, at his peril, take care to recite it certainly, because it is the ground of his action; and the court will not aid him by intending that there is another statute to maintain his action, different from that whereon he himself hath founded it.

Lit. Rep. 369.
B. 2. v. 23. f.
106.
Flowd. 84.
C. C. 233.
Dyer 77.
Com. 1 And. 76.

Stat. 9. III. That in such an action against the buyer of a pretended title, it ought expressly to appear, that the defendant did know that the seller had not been in possession the year before; and *vice versa*, that in such an action by the buyer the contrary ought to appear, for otherwise it may be intended, that he was *particeps criminis*, and therefore ought not to have any share of the penalty.

11. 116.
1 Barr. 302.

Stat. 10. IV. That it is not sufficient to shew, that the seller had not been in possession, &c. a year before, without expressly averring that he had a pretended right or title, because that is the point of the action.

Lit. Rep. 369.
Dyer 77.
Plowd. 84, 88.
C. C. 233.

Stat. 11. V. That is not (a) sufficient to set forth the value of the land at the time of the conveyance executed, without shewing the value at the time of the bargain, because the tenure is governed by the latter.

(a) C. C. 233.

Stat.

(1) 3 Co. 76.
C. 1. 10. 50.
M. 1. 65.
P. 1. 1. 10.
D. 1. 1. 10.
(2) C. 1. 10.
C. 1. M. 10.
D. 1. 1. 10.
(3) C. 1. 10.
369.

Stat. 12. VI. That a contract for (a) customary right to a copyhold estate, or for a lease for (b) years, is as much within the statute as a contract for the fee simple; for the words of the statute are, *any right or title*, and such contracts are as much within the mischief intended to be redressed by the statute as any others can be: but it is (c) said, that a lease for years made with an intent to try the title in ejectment, is not within the meaning of the statute, because it is in a kind of course of law, unless it be made to a powerful man to sway the cause.

P. 1. 1. 10.
D. 1. 1. 10.

Stat. 13. VII. That in an action for the making such a lease for years, is it not necessary precisely to set forth the commencement and end of it, because the plaintiff is supposed to be a stranger to it.

1 L. 1. 16.
1 A. 1. 10.

Stat. 14. VIII. That a lease for years by one out of possession being made off the land, is as much within the statute as if it had been made upon the land, though it be wholly void in law; for it is a lease in reputation, and taken for such among the vulgar, and tends as much to disquiet the possession as if it had been effected in law.

P. 1. 1. 10.
P. 1. 1. 10.
C. 1. 1. 10.

Stat. 15. IX. That no conveyance made by one, who hath the uncontested possession, and undisputed absolute propriety of lands, is any way within the meaning of the statute, because it no way favours of maintenance, and can be prejudicial to no one; from whence it follows, that a disseisor obtaining the release of the disseisee, or a mortgagor redeeming his land, are in no danger of the statute in respect of any contract by them made, concerning such land after such release or redemption.

P. 1. 1. 10.
A. 1. 1. 10.

Stat. 16. X. That one who gains the possession of lands, by virtue of a judgment at law in affirmance of an ancient title, cannot come within the meaning of this statute in respect of any lease made of such lands; for it can never be imagined, that it was the intent of the statute to oblige all persons who should recover their lands, to occupy them themselves, which would be generally inconvenient, and often wholly impracticable; and therefore it must be admitted from the necessity of the case, that such persons may lawfully lease their lands and houses to proper tenants, to be manured and occupied for the usual rents: But if it shall appear, that the title to such lands is still contested notwithstanding such recovery, and that such lease was in truth designed for the maintenance of the title, I can see no reason why it should not be as much within the statute as any case whatsoever. However there seems to be no doubt, but that if a disseisee enter upon a disseisor, being in possession of the land under a pretended title, and immediately

shall

sell it to a stranger, he is as much within the statute as if he had been out of possession at the time of such sale; for notwithstanding his entry was lawful, and he had both the absolute property and possession of the land, yet inasmuch as the disseisor claims a title to it, which is yet in dispute, such a sale by the disseisee seems within the intent of the statute, which meant absolutely to restrain all persons from transferring their disputed titles to any stranger whatsoever. But it is said, that such a sale by a father to his son and heir apparent, is excepted out of the general purview of the statute, by common reason, which by the ties of nature as well as of interest, obliges such a son to maintain his father; yet it hath been holden that such a sale to a brother of the half blood is within the statute.

1 Leon. 166,
167. But Co.
Lit. 369. seems
contrary.

Sail 95, 96.
1 Leon. 167.
Mordaunt 656.

Sec. 17. XI. It is said that the abovementioned proviso, that
“one, who is in lawful possession by taking the yearly rents or
“profits of lands, &c. may lawfully buy the pretended right
“of any other person by reasonable means,” is no more than
the law would have implied, if it had not been expressed; for
such a contract cannot possibly be to the wrong of any one,
and tends rather to quiet suits than to promote them. And
from the like reason also it is said, that a disseisor may lawfully
get the release of the disseisee, though his possession was un-
lawful; and it seems clear, that such a release cannot come
within the meaning of the statute, if the disseisee had the true
right, and no other and any pretence of title to the land;
for in such case it is clear, that the end of the release is not
for maintenance, but for the settlement of all disputes: But
if such a disseisee had had but a contested title, and such re-
lease were intended only to enable the disseisor to defend him-
self with the dubious title of his disseisee, surely it cannot but
be as much within the meaning of the statute, as any con-
veyance to one wholly out of possession. However it seems
clear, that those instances in the said proviso, by which it is
shown how it shall appear, that the persons who are permitted
to contract for pretended titles are in possession, as by the re-
ceiving of rent, &c. are only put for examples, and that those,
who are any way whatsoever lawfully seized in possession,
reversion, or remainder, are within the benefit of the proviso;
but it seems clear, that they can only justify the taking such a
conveyance as will strengthen the estate whereof they are
seized, and that they cannot take a covenant from a stranger
to convey the land to them, when he shall have recovered it
on a pretended right, because such a covenant seems clearly
to favour as much of maintenance, as if they had been stran-
gers to the land.

1 Leon. 167.
Sail 94, 96.

Co. Lit. 369.

Co. Lit. 369.

With a Hack.
Page 382.

† *Stat.* 18. And it is enacted, by the 31 Eliz. c. 5. s. 4.
“ That the offence of buying titles may be laid in any coun-
ty, at the pleasure of the informer.”

APPENDIX THE SIXTEENTH.

CHAPTER THE EIGHTY-SEVENTH.

OF SEDUCING ARTIFICERS.

In the cases of
Rex v. Medcalf
and Rex v.
Knight, who
were convicted
by confession,
upon informa-
tion, or by in-
formation, of
seducing four
different arti-
cers from the
host, but they
could not be
prosecuted
at the time
of the trial.
Baker, 223.

IT is enacted by 5 Geo. 1. c. 27. “ that whosoever shall con-
“ tract with, entice, endeavour to persuade or solicit any
“ manufacturer or artificer of, or in wool, iron, steel, brass,
“ or any other metal; clock-maker, watch maker, or any
“ other artificer or manufacturer of Great Britain, to go out
“ of this kingdom into any foreign country, out of the king’s
“ dominions on conviction by indictment or information at
“ Westminster, or at the assizes, or at the quarter sessions,
“ shall be fined not exceeding 100*l.* and suffer three months
“ imprisonment; and whoever shall offend a second time shall
“ be fined at the discretion of the court, imprisoned twelve
“ months, and in both cases be confined until the fine be
“ paid. Provided the prosecution be within twelve months.”

† *Stat.* 2. And it is further enacted “ that if any of his ma-
“ jesty’s subjects within this kingdom, being such artificer or
“ manufacturer as aforesaid, shall go into any country out of
“ the king’s dominions there to use or exercise, or to teach
“ any of the said trades, or manufactures to foreigners, or
“ who shall be so abroad, using or exercising the said trades
“ or manufactures beforementioned, and shall not return into
“ and continue in this realm, within six months next, after
“ warning shall be given to him by the ambassador, envoy,
“ resident, minister, or consul of the crown of Great Britain
“ in the country in which such artificer shall be, or by any
“ person authorised by any of them, or by a secretary of state,
“ he shall be incapable of taking any legacy devised to him;
“ or of being executor or administrator; or of taking any
“ lands, tenements, or hereditaments, by descent, devise, or
“ purchase; and also forfeit all his estate real and personal to
“ his majesty’s use, be deemed an alien, and out of the king’s
“ protection.”

† *Stat.* 3. It is also enacted “ that upon complaint on oath
“ to any justice of the peace, that any person is endeavouring

“ to seduce any such artificer, or manufacturer as aforesaid.
 “ Or that such artificer or manufacturer hath contracted, pro-
 mised, or is preparing to go abroad as aforesaid, he may
 send his warrant to bring the offender complained of before
 him or some other justice of the same county, and if it shall
 appear by the oath of one witness, or by confession that
 such person is guilty of any of the offences aforesaid, the
 justice may bind him over with sureties to appear at the
 next assizes, or quarter session, and in case he shall refuse
 to give such security, he shall be committed to the county
 gaol until delivered by due course of law. And if con-
 victed upon any indictment, of any such promise, contract or
 preparation to go abroad as aforesaid; he shall give satis-
 factory security not to go abroad, and be imprisoned until
 the same is given.”

† *Sec. 4.* To render the intent of the above recited statute more effectual. It is enacted by 23 Geo. 2. c. 13. “ that who-
 ever shall contract with, entice, persuade, or endeavour to
 persuade, solicit, or seduce any manufacturer, workman, or
 artificer of, or in wool, mohair, cotton, or silk, or of, or in
 any manufactures made up of these materials, or any
 of the said materials mixed one with another, or of, or in
 iron, steel, brass, or any other metal, or any clock-maker,
 watch-maker, or any other manufacturer, workman, or
 artificer, of or in any other of the manufactures of Great
 Britain or Ireland into any foreign country not within the
 dominions of or belonging to the crown of Great Britain,
 on conviction or information at Westminster, or by indict-
 ment at the assizes for the county, if in England, or the
 court of judicature, or any circuit court in Scotland, or by
 indictment or information in the king’s bench in Ireland,
 shall forfeit for every artificer 500 *l.* lesser imprisonment in
 the county gaol for 12 calendar months, and until the for-
 feiture shall be paid. And on a second or subsequent con-
 viction for the like offence, the offender shall forfeit one
 thousand pounds, and be confined for two years as aforesaid,
 prosecution to be within twelve calendar months.”

By Aston J.
 the punishment
 directed by this
 act is *proportio-*
nary and the *dis-*
crepancy is left in
 the court. But-
 ton 226.

† *Sec. 5.* In the case of *Rex v. Cater*, who was convicted
 upon these statutes of seducing a *coach spring maker*, Lord
Mansfield said that this latter act seemed to be a repeal of the
 former act; for it was made to supply its deficiencies.

4 Burr. 2264.
 and in
 the case of
 the case of

† *Sec. 6.* And it is enacted by 22 Geo. 3. c. 60. “ that
 whoever shall contract with, entice, persuade, or endea-
 vour to seduce or encourage any artificer, or workman,
 concerned or employed, or who shall have worked at, or
 been employed in printing calicoes, cottons, muslins, or
 linens

“linens of any sort, or in making or preparing any blocks
 “plates, engines, tools, or utensils for such manufactory, to
 “go out of Great Britain to any parts beyond the seas, and
 “shall be convicted thereof upon indictment or information
 “in the court of king’s bench at Westminster, or by indictment at the assizes, court of justiciary, or circuit court in
 “Scotland, as the case may be; shall for every artificer, forfeit
 “500*l.* and suffer imprisonment in the common gaol for 12
 “calendar months, and until such forfeiture be paid, And
 “in case of a subsequent offence of the same kind, every person
 “so offending again, shall, upon the like conviction, forfeit
 “1000*l.* and be confined two years as aforesaid, half
 “to the king, and half to the informer. But the prosecution
 “must be in 12 months after the offence committed.”

† *Stat. 7.* And it is further enacted, by 25 Geo. 3. c. 67.
 “That whoever shall contract with, entice, persuade, or endeavour
 “to seduce or encourage any artificer or workman
 “concerned or employed, or who shall have worked at or
 “been employed in the iron or steel manufacturers in this
 “kingdom, or in making or preparing any tools or utensils for
 “such manufactory, to go out of Great Britain to any parts
 “beyond the seas (except to Ireland) and shall be convicted
 “by indictment or information in King’s Bench or by indictment
 “at the assizes, gaol delivery, or quarter sessions for the
 “county or place wherein such offence shall be committed, or
 “the offender shall live or reside, or by indictment in the court
 “of justiciary, &c. in Scotland, as the case may be, shall for
 “every artificer forfeit and be punished in the manner last before
 “directed; prosecutions to be within 12 months.” (1)

(1) *N. B.* For employing artificers in certain branches of manufactory, for the regulation of their wages; and for the punishments of their disobedience. Vide 4 Burn’s Justice, 124 to 127.

APPENDIX THE SEVENTEENTH.

CHAPTER THE EIGHTY-EIGHTH.

OF ACTING PLAYS WITHOUT LICENCE.

IT is enacted by 10 Geo. 2. c. 28. “That every person
 “who shall for hire, gain, or reward, act, represent or
 “perform, or cause to be acted, represented or performed
 “any interlude, tragedy, comedy, opera, play, farce, or
 “other entertainment of the stage, or any part or parts
 “therein, in case such person shall not have any legal settlement
 “in the place where the same shall be acted, represent-
 “ed

“ ed or performed without letters patent or licence from the
“ chamberlain shall be deemed a rogue and vagabond, and
“ suffer accordingly, unless, having or not having a legal
“ settlement, he shall for every such offence forfeit fifty
“ pounds.”

† Sect. 2. And it is further enacted, “ That no person
“ shall for hire, gain or reward, act, perform, represent, or
“ cause to be acted, performed or represented any entertain-
“ ment of the stage, or any new act, scene, or other part ad-
“ veyed to any old interlude or other entertainment of the
“ stage, or any new prologue or epilogue unless a true copy
“ thereof be sent to the Lord Chamberlain, fourteen days, at
“ least, before the acting, representing or performing there-
“ of, together with an account of the play-house or other
“ place where the same shall be, and the time when the same
“ is intended to be first acted; signed by the manager, or one
“ of the managers of such play-house or company of actors
“ therein, on pain of fifty pounds.”

A copy of all
entertainments
sent to the
chamberlain.

† Sect. 3. And it is further enacted, “ That the Lord
“ Chamberlain shall in his discretion, prohibit the acting,
“ performing, or representing any interlude, tragedy, come-
“ dy, opera, play, farce, or other entertainment of the
“ stage, or any act, scene or part thereof or any prologue, or
“ epilogue; and every person offending against such prohibi-
“ tion or against the provision of the foregoing section, shall
“ forfeit 5*l.* and the manager's licence, if one was granted,
“ shall also be null and void.”

The power
which chamber-
lain has.

* Sect. 4. And it is also enacted, “ That if any enter-
“ tainment of the stage as above described shall be a^d acted, re-
“ presented or performed in any house or place where wine,
“ ale, beer or other liquors shall be sold or retailed, the same
“ shall be deemed to be acted for gain, hire, and reward.”

It is provided
that no person
shall be

† Sect. 5. And it is further enacted, “ That all pecuniary
“ penalties shall be recovered in a summary way before two
“ justices for the county or place where any such offence shall
“ be committed, by confession, or on the oath of one witness
“ or in any of the courts of record at Westminster by action,
“ &c. Or before the court of session in Scotland, according
“ to the locality of the offence, to be levied by distress and
“ sale, for the equal benefit of the informer, and the poor,
“ and for want of distress the offender shall be committed to
“ any house of correction for the county or place, not ex-
“ ceeding six months. But an appeal may be made to the
“ next quarter sessions, whose order shall be conclusive. Pro-
“ secution to be within six months, and the special matter
“ may be given in evidence on the general issue.”

How the pen-
alties may be re-
covered.

APPENDIX THE EIGHTEENTH.
CHAPTER THE EIGHTY-NINTH.
OF EMBEZZLING NAVAL STORES.

For the offence
of embezzling
the king's ar-
mour, vide ante
p. 75.

In what man-
ner the goods
be marked.

Penalty for
violation in
custody.

(a) The goods
must be found
in the custody
of the offender;
that is their
being found
in the custody
of the offender,
or in the custody
of the officer
of the navy.
11 R. 2. 1235.

THE evidence, upon prosecutions for stealing and embezzling the king's stores, seldom amounting to more than that "such goods are marked with the king's mark, and found in the custody and possession of the person accused." And this want of direct proof, that the offender actually carried away the goods, tending to encourage this evil practice, it is enacted by 9 and 10 Will. 3. c. 41. s. 1. "That it shall not be lawful to or for any person or persons whatsoever, other than persons authorised by contracting with his majesty's principal officers or commissioners of the navy, ordnance, or victualling office for his majesty's use, to make any stores of war, or naval stores whatsoever, with the marks usually used to, and marked upon his majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards, wrought with a white thread laid the contrary way, or any small cordage, to wit, from three inches downwards with a twine in lieu of a white thread, laid the contrary way as aforesaid, or any canvass wrought or unwrought, with a blue streak in the middle, or any other stores with the broad arrow, by stamp, brand, or otherwise; upon pain of forfeiting such goods; and the sum of 200*l.* together with costs of suit; one moiety to the king, the other moiety to the informer, to be recovered in any of his majesty's courts of record at Westminster."

4 Sect. 2. And it is farther enacted par. 2. "That such person or persons in whose custody, possession, or keeping, such goods or stores marked as aforesaid, shall be found, (a) not being employed as aforesaid; and such person or persons, who shall conceal such goods or stores marked as aforesaid, being indicted and convicted of such concealment, or of having such goods found in his custody, possession, or keeping, shall forfeit such goods, and 200*l.* with the costs of the prosecution, to be equally divided between the king and the informer, and also suffer imprisonment until payment thereof, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods as he or she shall then be indicted for, and the occasion and reason of such goods coming to his or her hands or possession. And by par. 4. the com-

missioners

“ commissioners, upon selling any such stores, are empowered to grant such certificates, expressing the quantities of such stores, and the time when and where they were bought of the said commissioners, within 30 days after their sale and delivery. And the said purchaser may also grant certificates to the persons to whom they may sell the said stores.”

Unless, under a certificate, which the commissioners may grant.

† *Sec. 3.* And it is further enacted by 1 Geo. 1. c. 25. f. 6. “ That if any person shall counterfeit the hand of any officers of the navy to any paper whereby his majesty’s treasure may be disposed of, or shall knowingly produce the same, he shall be bound over by the said officers and commissioners, or any of them, until he find surety to appear at the next assizes, or quarter sessions, to be there proceeded against according to law.”

Counterfeiting certificates.

+ *Sec. 4.* And it is farther enacted par. 5. “ That if any be sued for discovering or seizing such stores, the general issue may be pleaded, and the special matter given in evidence. And in case upon the trial of such issue, the defendants shall prove the goods were marked as aforesaid, and the plaintiff shall not prove he was employed as aforesaid, and had such certificate as aforesaid, and did shew the same to the defendant before suit brought, the defendant shall be acquitted and receive treble costs, unless the defendant, upon the sight of such certificate did not deliver back all such goods and stores so seized in as good plight and condition as they were at the time of such certificate shewn.”

How prosecutions may be defended.

+ *Sec. 5.* And it is farther enacted by 9 Geo. 1. c. 8. f. 3. “ That if any person or persons shall be lawfully convicted of having in his, her, or their custody, any timber, thick stuff, or plank marked with the broad arrow, or concealing any timber, thick stuff or plank so marked, he shall suffer as an offender against 9 and 10 Will. 3. c. 41, above recited.”

Extended to timber, thick stuff and plank.

† *Sec. 6.* But it is provided by par. 4. “ That any judge before whom any offender shall be convicted of any crimes before recited, enacted or mentioned in this act, may mitigate the penalty for the same.”

Judge may mitigate the penalty.

+ *Sec. 7.* And it is further enacted par. 5. “ That if any dispute arise between the persons upon whose informations or oaths any offender against this act, or the 9 and 10 Will. 3. c. 41. shall be prosecuted and convicted, touching any right or title to any of the forfeitures or penalties before-mentioned, or any part thereof, the judge or justice constituting shall examine and settle the same.”

How disputes respecting the forfeitures shall be settled.

† *Sec. 8.* And it is farther enacted by 17 Geo. 2. c. 40. f. 1. “ That any judge at the assizes, or justices of the peace, at

Before whom the offence may be tried.

4 Mod. 145.
7 B. 10. 427.
C. 1. 1. 116.
H. 1. 1. 116.
S. 1. 1. 116.
1. 1. 116.

“ at the general quarter sessions, may hear, try, and determine,
“ by indictment (a) or otherwise, all or any the crimes or of-
“ fences mentioned in the said recited act of 9 and 10 Will.
“ 3. c. 41. and 9 Geo. 1. c. 3. And that the said justices of
“ assize or quarter sessions may impose any fine, not exceed-
“ ing 200 l. on such offender, one moiety to the king, and
“ the other moiety to the informer; and may mitigate the
“ said penalty and forfeitures, inflicted by the said recited acts,
“ or either of them, and commit the offender to the common
“ gaol till paid. Or in lieu thereof may punish such offender
“ corporally, by causing him to be publicly whipped, and com-
“ mitted to some house of correction to hard labour for three
“ months, or for less time as to such judge of assize, or quar-
“ ter session shall seem meet.”

C. 1. 1. 116.
S. 1. 1. 116.
1. 1. 116.

† Sect. 9. And it is further enacted by 9 Geo. 3. c. 30. s. 5.
“ That the treasurer, comptroller, surveyor, clerk of the acts,
“ or any commissioner of the navy for the time being, may
“ act as justices of the peace, to all intents and purposes in
“ causing any person or persons who shall be charged with
“ stealing or embezzling any naval stores, the property of his
“ majesty, to be apprehended, committed and prosecuted for
“ the same.”

APPENDIX THE NINETEENTH.

CHAPTER THE NINETEENTH.

OF EXERCISING A TRADE WITHOUT SERVING AN APPRENTICESHIP.

4 Mod. 145.
7 B. 10. 427.
C. 1. 1. 116.
H. 1. 1. 116.
S. 1. 1. 116.
1. 1. 116.

IT is enacted by 5 Eliz. c. 4. s. 31. “ That it shall not
“ be lawful to any person or persons, other than such as
“ now do lawfully use or exercise any art, mystery or manual
“ occupation, to set up, or supply, use or exercise any craft,
“ mystery, or occupation now used or occupied within the
“ realm of England or Wales; except he shall have been
“ brought up therein seven years at least as an apprentice in
“ the manner and form as the act describes; nor to set any
“ person to work in such mystery, art, or occupation being
“ not a workman at this day; except he shall have been ap-
“ prentice as is aforesaid; or else having served as an appren-
“ tice as is aforesaid, shall or will become a journeyman, or be
“ hired by the year; on pain of forfeiting for every default
“ forty shillings for every month; one moiety to the crown,
“ the other to the prosecutor; to be sued for in any court of
“ record;

“ed as forfeited.—Or was part of the stock of some importer or dealer whose warehouse or place shall be entered as afore said, expressing the quantity and quality thereof; and at what port or place the duties were so paid, or the commodity so condemned, or of whose stock the same was part upon pain of forfeiture.”

+ *Sec. 3.* And it is further enacted, par. 15. “That no such commodities shall be sold, uttered, or exposed to sale, either by wholesale or retail, but in some or one of the said warehouses or places as afore said, on pain of 40 s. a gallon, &c.”

+ *Sec. 4.* And it is further enacted, par. 16. “That the officers of excise where such commodities shall be so sold, shall upon the request of the seller, without fee or reward, give to the respective buyers thereof certificates in writing signed by the said officer or officers expressing the quantities so sold, and the name and names of the respective buyers, and sellers thereof; and that the duty on such article so sold has been paid, or that the same has been condemned as forfeited; or was part of such dealer's stock as afore said:—to satisfy the officer of excise of the respective divisions to which the same is intended to be carried.”

+ *Sec. 5.* And it is further enacted par. 17. “That no such commodities, exceeding the quantity of one gallon shall be removed or carried from any part of this kingdom to another, by land, or by water, without such permit or certificate, on pain of forfeiture.”

+ *Sec. 6.* And it is further enacted, par. 18. “That whoever shall have in custody above the quantity of sixty-three gallons shall be deemed a dealer.”

+ *Sec. 7.* But as dealers have frequently practised the trick of taking out false permits for the purpose of protecting and conveying such commodities which they had clandestinely run on shore; it is further enacted, by 11 Geo. 30.

(a) Officer
and ch

10. “That the said commodities (a) shall be removed within a certain time to be specified in such permit, and that the permit shall be returned to the officer from whom the same was had, and that in case, upon taking an account of the stock of the person, from or out of whose stock the commodities mentioned in such permit are authorised to be removed, there shall not appear a sufficient decrease to answer the removal mentioned in such permit, the person from whose stock such permit granted the removal, shall forfeit the like quantity as shall be mentioned in such permit as afore said.”

at *Sec. 7.*

† *Sec. 8.* And it is further enacted, “ That no person shall demand, take, or receive any permit as aforesaid, without special direction in writing, of the person, or his known servants, from, or out of, whose stock the said commodities are to be removed, on pain of 50 l.”

† *Sec. 9.* By 23 Geo. 3. c. 70. s. 3, 4, 5. directions are given in what manner permits shall be taken out, and what particulars shall be specified in the request notes from the trader for that purpose.

† *Sec. 10.* The commissioners of excise for England and Scotland are also directed by the said statute, par. 8. “ To provide moulds for making of paper to be used for permits, which paper shall have the words EXCISE OFFICE, visible in the substance of such paper; and the said commissioners shall also provide plates engraved with certain marks, stamps and devices, to be varied from time to time as they shall think proper, for the printing, marking and stamping of the said paper.”

† *Sec. 11.* And it is further enacted by the said statute, 23 Geo. 3. c. 70. s. 9. “ That if any person or persons whatsoever (not being authorized by the respective commissioners so to do) shall make or cause or procure to be made, or shall knowingly aid or assist in the making or without being authorized or appointed as aforesaid, shall knowingly have in his, her or their custody or possession, without lawful excuse (the proof whereof shall lie upon the person accused) any frame, mould or instrument for the making of paper with the words, EXCISE OFFICE visible in the substance of such paper; or shall make, or cause, or procure to be made, or knowingly aid or assist in the making of any paper, in the substance of which the words, EXCISE OFFICE shall be visible; or if any person (except as before excepted) shall by an act, mystery or contrivance, cause or procure the said words, EXCISE OFFICE to appear visible in the substance of any paper whatever—Or if any person or persons whatever (not being appointed as aforesaid) shall engrave, cut out, or make, or shall cause or procure to be engraven, cast, cut, or made any plate or plates or other thing with any mark, stamp, or device thereon, in imitation of, or to resemble any mark, stamp, or device made and used by the direction of the said commissioners of excise, or the major part of them respectively, in manner as aforesaid (a) for the purpose of printing, stamping, and marking of the paper to be used for a permit or permits to accompany any exciseable commodity or commodities removed or removed from one part of this kingdom to any other

(a) Vide the
; thereon of
the act.

"part thereof in pursuance of the several statutes requiring
"such permit, any person so offending in any of the cases
"aforesaid, shall on conviction be adjudged a felon, and suf-
"fer death without benefit of clergy."

† Sec. 12. And it is farther enacted by the said statute par.
10. "That if any person or persons whatsoever, shall counter-
"feit or forge or cause to be counterfeited, or forged any per-
"mit for the removal of any exciseable commodity from one
"part of this kingdom to any other part thereof, for the re-
"moval of which a permit or certificate is by any act or acts
"of parliament now in force required;—or if any person or
"persons shall knowingly or willingly give any false or untrue
"permit, or shall knowingly or willingly accept or receive
"any false or untrue permit with any such exciseable commo-
"dity to be removed, or removed as aforesaid; or if any
"person or persons shall fraudulently alter or erase any per-
"mit after the same shall have been given or granted by the
"proper officer of excise, or if any person or persons shall
"knowingly or willingly publish or make use of any such
"permit so counterfeited, forged, false, untrue, altered, or
"erased; every person so offending shall (in lieu of any for-
"mer penalty) for each and every such offence forfeit five
"hundred pounds to be recovered in any court of record at
"Windsor, or in the court of exchequer in Scotland."

† Sec. 13. And it is further enacted, par. 11. "That
"if any officer of excise or other inland duties shall deliver out,
"or suffer to be delivered out, any paper having the words,
"EXCISE OFFICE visible in the substance thereof either be-
"fore or after the stamp or mark so to be provided as aforesaid
(a) shall be printed thereon, or before the same shall be fil-
"led up agreeable to the request made, brought from any
"trader for the purpose of having a permit for the removal
"of some exciseable commodity; or if any such officer shall
"knowingly give or grant any false or untrue permit; or
"shall make any false or untrue entry in the counter-part or
"counter parts of any permit or permits by him given or
"granted for the removal of any exciseable commodity
"from the stock of any dealer therein; or shall knowingly
"and willingly receive or take any exciseable commodity
"whatsoever into the stock of any such dealer, brought in
"with any false, forged, or untrue permit, or shall know-
"ingly permit or suffer the same to be done, directly or in-
"directly, contrary to the true intent and meaning of the
"several statutes (b) in such case made and provided, every
"such officer so offending shall, on conviction, be adjudged
"guilty of felony and shall be transported, not exceeding
"seven years."

APPEN-

(a) With the
section 12, 13.

(b) With the
several statutes
made and provided
in such case made
and provided, every
such officer so offend-
ing shall, on conviction,
be adjudged guilty of
felony and shall be
transported, not ex-
ceeding seven years."

APPENDIX THE TWENTY-FIRST.

CHAPTER THE NINETY-SECOND.

OF SURCHARGING BOATS, &c.

FOR preventing the losing of lives of persons passing on the river Thames between Gravesend and Windsor, it is enacted by 10 Geo. 2. c. 31. s. 8. "That no person or persons who shall work or navigate any tilt boat, row-barge, or any other boat or wherry for hire or gain shall receive, take into or carry in any such tilt, or row-barge at one and the same time any more than 37 passengers, and three more passengers only by the way—nor shall receive take into or carry in any other boat or wherry any more than eight passengers and two more only if called in by the way, nor shall receive take into or carry in any ferry-boat or wherry allowed to work on *Sundays* any more than eight passengers at one and the same time; on pain of 5*l.* for the first offence 10*l.* for the second offence, and for the third offence shall be disabled to work any boat or vessel, &c. and be disfranchised of the waterman's company for twelve months, on conviction by one witness before one magistrate."

+ *Sec. 2.* And it is further enacted, "That in case any greater number of persons shall be received, taken into, or carried in any such tilt boats, row-barges, ferry boats, or other boats or wherries than are respectively allowed to be carried as aforesaid and any passenger or passengers shall then be drowned, every such person or persons who shall work or navigate such tilt boats, row-barges, ferry-boats, or other boats or wherries offending therein, shall be deemed guilty of felony and transported as felons."

APPENDIX THE TWENTY-SECOND.

CHAPTER THE NINETY-THIRD.

OF VAGRANTS.

IT is enacted by 17 Geo. 2. c. 5. "That all persons who threaten to run away and leave their wives or children to the parish—And all persons who shall unlawfully return to such parish or place from whence they have been legally removed by order of two justices without a certificate from the place whereunto they belong.—And

the and disorderly persons

"all

“ all persons who, not having wherewith to maintain themselves, live idle without employment, and refuse to work for the usual and common wages given to other labourers for the like work in the parishes or places where they are. And all persons going about from door to door or placing themselves in the streets, highways or passages to beg or gather alms in the parishes or places where they dwell shall be decreed—**IDLE AND DISORDERLY PERSONS.**”

† *Stat. 2.* And it is further enacted, “ That any justice may commit such offender, on conviction before him, by his own view, their confession, or the oath of one witness, to the house of correction not exceeding one month.”

(9) For which the justice may order the overseer to pay him s. vide 4 Burr. 335.

† *Stat. 3.* And any person may apprehend (a) and carry before a justice any such persons going about from door to door or placing themselves in streets, highways or passages to beg or gather alms in the parishes or places where they dwell; and if they resist or escape they shall be punished as—**ROGUES AND VAGABONDS.**

Rogues and vagabonds.—For another species of rogue and vagabonds. Vide 23 Geo. 3. c. 88. ante page 148. and 163.

(10) Vide 4 Burns Justice 333. and ante p. 163.

(11) Vide 4 Burns Justice, 333.

(12) This shall not extend to the 31 Eliz. c. 17. Vide ante page 183.

† *Stat. 4.* And it is further enacted, par. 2. “ That all persons going about as patent gatherers or gatherers of alms, under pretences of loss by fire or other casualty— or going about as collectors for prisons, gaols, or hospitals; all fencers or bearwards, all common players of interludes, all persons who shall for hire, gain or reward, act, represent or perform, or cause to be acted, &c, any entertainment of the stage or any part or parts thereof not being authorized by law, all minstrels (b) and jugglers, all persons pretending to be gypsies, or wandering in the habit or form of Egyptians, (c) or pretending to have skill in physiognomy, palmistry, or like crafty science, or pretending to tell fortunes, or using any subtle craft to deceive and impose upon any of his majesty's subjects, or playing or betting at any unlawful games or plays; and all persons who run away and leave their wives and children whereby they become chargeable to any parish or place—and all petty chapmen and pedlars wandering abroad without licence, and all persons wandering abroad and lodging in alehouses, barns, out-houses, or in the open air not giving a good account of themselves—and all persons wandering abroad and begging, pretending to be soldiers, mariners, sea-faring men, (d) or pretending to go to work in harvest.—And all other persons wandering abroad and begging shall be deemed—**ROGUES AND VAGABONDS.**”

Incorrigible rogues.

† *Stat. 5.* And it is further enacted, par. 4. “ That all and gatherers convicted according to 13 Geo. 1. c. 25.—**And**

“ And all persons apprehended as rogues and vagabonds, and
 “ escaped from the persons apprehending them, or refusing to
 “ go before a justice, or to be examined upon oath, or refus-
 “ ing to be conveyed by such pass as this act mentions, or
 “ knowingly giving a false account of themselves upon such
 “ examination, after warning given them of their punishment.
 “ And all rogues and vagabonds who shall break or escape out
 “ of any house of correction when confined by virtue of this
 “ act. And all persons who after having been punished as
 “ rogues and vagabonds and discharged shall again commit any
 “ of the said offences shall be deemed—INCORRIGIBLE
 “ ROGUES.”

† *Stat. 6.* And it is further enacted, par. 5. “ That any
 “ person may apprehend the offender and carry him before a
 “ justice (a) and in case he shall be charged by a justice so to
 “ do, and shall not use his best endeavours for such purpose he
 “ shall forfeit ten shillings.”

(a) For which the justice may order a reward of 10s. to be paid by the county.

† *Stat. 7.* And it is further enacted, par. 6. “ That
 “ two justices shall meet four times in the year or oftner if
 “ need be, in their respective divisions, and by warrant com-
 “ mand the constable, &c. to make a general privy search in
 “ one night, for the apprehending of ROGUES AND VAGA-
 “ BONDS. And every justice on information shall issue his
 “ warrant to apprehend rogues and vagabonds within his ju-
 “ risdiction.

Privy search.

† *Stat. 8.* And it is further enacted, par. 7. “ That the
 “ justice shall inform himself by the examination on the oath
 “ of the person so apprehended, or of any other person, of
 “ the condition and circumstances of such person and where
 “ he was last legally settled; the substance of which shall be
 “ put into writing and subscribed by the person examined, and
 “ by the justice who shall transmit the same to the next quar-
 “ ter session—And such justice shall order the person so appre-
 “ hended to be publicly whipped (b) and sent to the house of
 “ correction until the next quarter session or for any less time,
 “ or convey him by pass under hand and seal to the last place
 “ of legal settlement; but if it cannot be found then to the
 “ place of birth, or if such person be under the age of four-
 “ teen years, and have any father or mother living then to
 “ their place of abode there to be delivered to the parish
 “ officers, a duplicate of which pass and examination shall
 “ be filed at the next quarter sessions.”

Examination.

Punishment.

(b) Vide 22 Hen. 8. c. 12. 39 Eliz. c. 4.

† *Stat. 9.* And it is further enacted, par. 9. “ That
 “ where any offender shall be committed till the next session,
 “ and the justices shall adjudge such person a rogue and vaga-
 “ bond, or an incorrigible rogue they may order him to be
 “ detained

Further punish-
 ment.

Transport

“detained in the house of correction not exceeding six months, and such incorrigible rogue for any further time not exceeding two years nor less than six months, and whipped, and afterwards be sent away by such pass *mutatis mutandis* as aforesaid.—And if such person *being a male* is above the age of twelve years the session may send him to be employed in his majesty’s service either by sea or land. And in case any such incorrigible rogue shall break or escape from the house of correction, or shall offend again in like manner he shall be transported for seven years.”

† Stat. 10. And it is enacted by 13 and 14 Car. 1. c. 12. “That the justices in sessions may transport such rogues, vagabonds, and sturdy beggars, as shall be convicted and adjudged to be incorrigible.”

Vagrants children.

† Stat. 11. And it is also enacted by 17 Geo. 2. c. 5. s. 2d. “That if the child of any vagrant above seven years of age shall be committed to the house of correction, the justices in sessions may order such child to be placed out as a servant or apprentice untill the attainment of 21 years or a male’s time, and if any offender found wandering with such child, shall be again found with the same child to be placed out, he shall be deemed an INCORRIGIBLE ROGUE.”

† Stat. 12. And it is further enacted, “That where any vagrants have been committed to the house of correction till the next sessions, it on examination of such persons no place can be found, to which they may be conveyed, the sessions shall order them to be detained and employed in such house of correction until they can provide for themselves, or until the justices in sessions can place them in some lawful calling as servants or apprentices, soldiers, mariners or otherwise.”

12 Geo. 2. c. 5. s. 2d.
13 Geo. 2. c. 12.
14 Geo. 2. c. 12.

† Stat. 13. And it is further enacted, par. 10. “That the justice who shall make the pass, shall at the same time deliver to the officer appointed to convey the vagrant a note or certificate (a) ascertaining how they are to be conveyed, by horse, cart, or on foot, and what allowance such officer is to have, according to the rates appointed by the session. By stat. 16. Which rates the justices are authorized to make as they shall think proper.”

14 Geo. 2. c. 12.
15 Geo. 2. c. 12.

† Stat. 14. And it is further enacted, par. 11. “That the officer shall convey the person accordingly, the next direct way to where he is ordered to be sent, if in the same county, riding, division, corporation or franchise; if not he shall deliver the person to the constable of the first place in the next county, &c. &c. in the direct way to the place whither he is to be conveyed, together with the pass and duplicate of the examination, taking his receipt for the same. } And

“ And such constable shall immediately apply to some justice of the division who shall make the like certificate and deliver it to such constable who shall with all speed convey such person unto the first parish, town or place in the next county or division in the direct way to the place to which he is to be conveyed. And so from one county or division to another, till they come to the place to which such person is sent, and the constable who shall deliver such person to the churchwarden or other person ordered to receive him, shall at the same time deliver the said pass with the duplicate of the examination, taking their receipt for the same.”

† *Stat. 15.* And it is further enacted, par. 12. “ That any justice may order the vagrant to be searched, and his bundles to be inspected in his presence; and if he shall be found to have sufficient for his passage, either in whole or in part, the justice shall order so much of the money to be paid, or, if other effects, to be sold towards taking up and passing such vagrant, &c.”

Vagrants may be searched.

† *Stat. 16.* And it is further enacted, par. 17. “ That if any petty constable shall bring to any high constable such certificate as aforesaid, together with a receipt or note from the constable to whom the person was delivered, the said high constable shall pay the rates ascertained by such certificate, taking the petty constable's receipt; the high constable to be allowed the same on passing his accounts, on his delivering up such certificate and receipt, and giving his own receipt for the same to such treasurer; the same to be allowed the treasurer in his accounts on delivering up the vouchers as aforesaid, and if the high constable shall refuse or neglect to pay the same on demand, it shall be lawful for one justice, by his warrant, to levy double the sum by distress, and thereout to allow the petty constable the sum ascertained by the certificate and such other recompence for his trouble, loss of time, and expences as the justice shall think fit; the overplus to be returned to the constable on demand. And in cities, towns corporate and other places where there is no high constable, the petty constable shall be allowed what he shall so pay pursuant to such certificate in his accounts on delivering up such vouchers; or if any master of a house of correction shall deliver such certificate and receipt to the treasurer, the treasurer shall pay the same to him taking his receipt for the same and be allowed the same in his accounts, &c.”

Part of the same.

† *Stat. 17.* And it is enacted by 26 Geo. 2. c. 34. s. 9. “ That when the high constable hath not money in his hands sufficient to answer the said expences the treasurer shall pay the

Expence of the same.

“ the same to such petty constable on his producing the certificate and such other vouchers as aforesaid.”

Penalty of counterfeiting certificate.

† *Stat.* 18. And it is further enacted, by 17 Geo. 2. c. 5. s. 18. “ That if any petty constable or governor of any house of correction shall counterfeit any such certificate or receipt, or knowingly permit any alteration to be made therein he shall forfeit 50*l.* And if he shall not convey such vagrants, or not deliver them to the proper person ; or if any constable shall refuse to receive any such person, or to give such receipt he shall forfeit 20*l.* by distress and sale by warrant of the justices in sessions where the offence shall be committed ; half to the informer and half to the treasurer, to be applied by him as part of the public stock.”

Vagrant to be set to work.

† *Stat.* 19. And it is further enacted, par. 19. “ That the parish or place to which any rogue, vagabond, or incorrigible rogue shall be conveyed shall employ in work, or place in some work-house or almshouse the person so conveyed until he shall betake himself to some service or other employment, and if he shall refuse to work, &c. the overseers may carry him before some justice to be sent to the house of correction to hard labour.”

Wife the wife of Rogue, Ringwood, Bath, South Wales &c.

† *Stat.* 20. And it is further enacted, par. 11. “ That if the churchwarden or other person who shall receive any person so sent shall think the examination to be false he may carry the person so sent before a justice, who, if he see cause may commit such person to the house of correction till the next sessions ; and the justices there may deal with such a person as an incorrigible rogue. But he shall not be removed from the place to which he is sent, but by order of two justices, in the same manner as other poor persons are removed to the place of their settlement.”

Test by grants

† *Stat.* 21. And it is further enacted by the said statute, par. 13. “ That the constable of any parish or place within the counties of *Cumberland, Northumberland, Durham,* or the town of *Berwick* shall, on any person being so delivered to him by a paupers examination, whose place of legal settlement is in *Scotland* deliver the examination to the clerk of the peace ; and convey such person with the paupers, and deliver him to some constable or other officer of the next parish, district or place within the next adjoining shire, stewartry or place, taking his receipt for him ; and if any such vagrant, after being so conveyed into *Scotland* shall be found wandering, begging or misbehaving himself in *England* he shall be deemed an incorrigible rogue.”

Vagrants

† *Stat.* 22. And it is further enacted, par. 14. “ That any matter of a vessel bound for *Ireland,* the *Isles of Man, Jersey, Guernsey* or *Dorset* shall, on warrant to him directed

“ed, under the hand and seal, of a justice of the place
 “where such vessel shall lie, take on board such vagrant as
 “shall be expressed in the warrant, and convey him to such
 “place; and for the charges thereof the constable who
 “serves him with the warrant shall pay him such rate by
 “the head, as the justices in sessions shall appoint, and such
 “master shall on the back of the warrant sign a receipt for
 “the money so paid, and also for the vagrant so delivered.
 “Which warrant so indorsed shall be produced to the justice
 “who signed and sealed the same, and, upon his allowance
 “thereof, under his hand, the money so paid shall be re-paid
 “by the county, as other money for conveying vagrants.
 “And such master neglecting or refusing to transport such
 “vagrants, or to indorse the receipt, shall forfeit 5 *l.* to the
 “poor of the parish or place where the offence shall be com-
 “mitted, to be levied by distress and sale of the ship or any
 “goods within the same, by warrant of one justice, return-
 “ing the overplus on demand after the penalty and charges of
 “the same are satisfied. But no master shall be compelled to
 “take on board more than one vagrant for every 20 tons
 “burthen.”

How such va-
 grants shall be
 conveyed.

§ 87. 23. And it is further enacted, par. 20. “It shall
 “be lawful for any two justices where any dangerous luna-
 “tic or mad person shall be found by warrant under their
 “hands and seals, directed to the constables, churchwardens
 “and overseers of the poor of the parish or place, or some of
 “them, to cause such person to be apprehended and kept
 “till he is locked up in some secure place within the county or
 “precinct, as such justices shall under their hands and seals
 “direct and appoint; and (if necessary) to be there chained,
 “if the last legal settlement of such person shall be within
 “such county or precinct; and if such settlement shall not
 “be there, then such person shall be sent to the place of his
 “or her last legal settlement by a pass *mutatis mutandi*, as
 “aforesaid, and shall be locked up or chained by warrant of
 “two justices of the county or precinct to which such per-
 “son is so sent; and the reasonable charges of removing,
 “and of keeping, maintaining and curing such persons dur-
 “ing such restraint (which shall be only during such lunacy
 “or madness) shall be satisfied and paid (being first proved
 “upon oath) by order of two justices directing the church-
 “wardens or overseers where any goods, chattels, lands or
 “tenements of such person shall be, to seize and sell so much
 “of them or receive so much of the annual rents of the lands
 “and tenements as is necessary to pay the same and to account
 “for what is so seized, sold, or received to the next quarter
 “sessions. But if such person hath not an estate to pay or
 “satisfy the same, over and above what shall be sufficient to

How lunatic
 vagrants may be
 disposed of.

N. B. The act
 for the better regu-
 lation of the
 rights over the
 person of lunatics.

“maintain

" maintain his or her family, then such charges shall be paid
" by the place to which such person belongs by order of two
" justices directed to the churchwardens and overseers."

Penalty of lodg-
ing vagrants.

† Sect. 24. And it is further enacted, par. 23. " That
" if any person shall knowingly permit any rogue, vagabond,
" or incorrigible rogue to lodge or take shelter in his house or
" barn or other out-house or building and shall not apprehend
" and carry him before a justice, or give notice to the constable
" so to do; and shall be convicted thereof by confession,
" or oath of one witness, before one justice, he shall forfeit
" not exceeding 40 s. nor less than 10 s. half to the informer
" and half to the poor by distress and sale; and if any
" charge shall be brought on any parish or place by means of
" such offence, the same shall be answered to the said parish
" or place by such offender and be levied by distress and sale
" of his goods as aforesaid: And if sufficient distress cannot
" be found, such offender shall be committed to the house of
" correction by the justice, for any time not exceeding one
" month."

Children born
in vagrancy.

† Sect. 25. And it is further enacted, par. 25. " That
" where any woman shall be delivered of a child or children
" and become chargeable to the parish or place, the church-
" wardens or overseers may detain her until they can safely
" convey her to a justice; who shall examine her and commit
" her to the house of correction until the next sessions, who
" may order her to be publicly whipped and detained for any
" further time not exceeding six months, and upon applica-
" tion by the churchwardens and overseers of the place where
" she was so delivered, the justices at such sessions shall order the
" treasurer to pay them a reasonable sum, for the charges
" such place has been put to on her account, and if she shall
" be detained and conveyed to a justice as aforesaid; the
" child of which she is delivered, if a bastard, shall not be
" settled where so born, nor be sent thither for want of other
" settlement, by a pass, by virtue of this act; but the settle-
" ment of such woman shall be deemed the settlement of such
" child."

Notes. Born laws,
the said act must
not be construed
of the whole
part, but in
order to give the
true meaning
and intention
thereof, the
words contained

Notes. By sect. 22, whoever shall neglect his duty, or resist the execution of this act shall forfeit
not exceeding 5 s. nor under 2 s. By sect. 32, the charges of apprehending, conveying, and
detaining offenders shall be repaid in the county rate. By sect. 26, an appeal is given to the next
quarter sessions, which shall be final. And by sect. 34, the power of *special franchises* with regard to
vagrants, is excepted from this act.

A

T A B L E

O F

P R I N C I P A L M A T T E R S,

C O N T A I N E D I N T H E

F I R S T V O L U M E.

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- 23 A justice may issue his warrant to apprehend an affrayer, &c. f. 18
- 24 Where a dangerous wound is given a justice may either commit or bail the offender 270 f. 19
- 25 Affrays are, in general, punishable by fine and imprisonment in proportion to the heinousness of the offence f. 20
- 26 As in fighting a duel, or carrying a challenge (for which one was fined 100*l.*) or by attempting a rescue; or obstructing officers in the discharge of their duty; or by committing the offence in any consecrated place f. 21, 22, 23
- 27 By 5 and 6 Edw. 6 c. 4. to quarrel, chide, or brawl in any church or church yard, incurs suspension *ab ingressu ecclesiae* in a layman, and from ministrations of office in a clerk; for so long as the ordinary shall think fit f. 24
- 28 To smite or lay violent hands upon another in a church or church yard. 126

A TABLE OF PRINCIPAL MATTERS:

ipso facto excommunicate the offender Page 271 f. 25

19 To strike another with a weapon in a church or church yard, or to draw with that intent, incurs excommunication as aforesaid, and the offender on conviction by a jury, or confession on the evidence of two witnesses shall have one of his ears cut off *ibid.* f. 26

20 And there must be a precedent conviction sent to the ordinary, or the offender shall not be excommunicated 272 f. 27

1 Son assault demesne is no excuse under this statute f. 28

2 Churchwardens, &c. who turn persons from a church, &c. for disturbing the congregation are not within this act f. 29

3 The ecclesiastical court may proceed upon the two first clauses 272 (N)

4 But if they proceed for damages on any of the clauses they shall be prohibited, &c. *ibid.*

5 Cathedrals and their cymetries are within the act *ibid.*

6 By 1 Mary, c. 3. to disturb any licensed preacher, to break any part of the church is imprisonment for three months, &c. 273

7 How such offender shall be tried *ibid.*

8 To disturb a reader of the common prayer is within the act *ibid.* f. 31

9 By 1 W. and M. c. 13. to disturb any tolerated preacher incurs a penalty of 50 l. on conviction before any justice on the oath of two witnesses f. 32

10 To make an affray in any of the king's inferior courts of justice is highly finable 89 f. 10

AFFIDAVITS.—See *Perjury*.

AFFIRMATION.

By 8 Geo. 1. c. 6. the affirmation of quakers shall have all the consequences of an oath 333 f. 24

AGE.—*Vide Infancy*, &c. No. 2 to 6.

AGNUS DEI.

1 By 13 Eliz. c. 2. whoever shall bring any into the realm *to be sworn*, shall be guilty of *perjury* Page 81 f. 24

2 And if a justice, on information, does not discover the offence to a privy councillor in fifteen days he shall be equally guilty f. 25

A L L O Y.

1 What portion shall be mixed with gold and silver coin 70 c. 18 (N) 1
Vide Coin. Bullion. Traces.

AIDING and ASSISTING.

1 Those found in a special verdict to have been aiding and assisting are guilty as principals 55 f. 26, 116, f. 9

2 Not within the statute, stabbing, 1 Jac. 1. c. 8 116 d. 7

3 In rape, all aiders present are principals 170 f. 6

A L L E G I A N C E.

1 By 13 Car. 2. c. 1. corporators must take the oath of allegiance, &c. at the same time when the oath of office is administered 15

2 By 1 Geo. 1. all officers civil or military shall take the oath of allegiance &c. 15

3 By 25 Car. 2. c. 2. all officers who hold places of trust, &c. shall take the oath, &c. f. 2

4 Allegiance is so inseparable from a natural born subject that he cannot by any means renounce it 51 f. 7

5 By 11 Hen. 7. c. 1. it is declared that all subjects are bound by *their allegiance* to serve the king in his wars and that none shall for the true duty of his allegiance be convict of any offence 52 f. 14

P p 3

6 Therefore

A TABLE OF PRINCIPAL MATTERS.

- 6 Therefore every king *for the time being* has a right to his people's allegiance *Page 52 f. 13*
- 7 A king *out of possession* has no right to allegiance *f. 16*
- 8 The people are bound to resist him *ibid.*
- 9 Allegiance is due before coronation *f. 18*
- 10 By 1 W. and M. c. 2. the people of England are absolved from their allegiance to a Popish successor *f. 21*
- 11 By 1 Will. and M. whoever shall refuse the oath of allegiance, &c. shall be committed, &c. *95 f. 4*

A L E and B E E R.

- 1 By 1 Will. 3. c. 14. no brewer or retailer shall use any molasses, coffee, &c. on pain of forfeiture and penalty of 100*l.* *312 f. 7.*
- 2 By 1 and 11 Will. 3. c. 21. if they shall receive above the weight of ten pounds of such articles into their custody they shall forfeit 100*l.* and the Forfeit or Penalty therein 100*l.* *f. 3.*
- 3 By 9 Ann. c. 12. They shall not use any Irons, wormwood, &c. on pain of 2*l.* *f. 39*
- 4 By 11 Ann. c. 2. no sugar, honey, foreign grains, Green pepper, or foreign butter, cuculus, Indur, &c. shall be used on pain of 20*l.* *513 f. 10*
- 5 By 54 Geo. c. 6. no gillnet shall be the privilege of the river *f. 31*
- 6 Within the city of Mortmain beer barrel must contain 26 gallons and all barrels 2 gallon, and in other parts 31*l.* *f. 62*
- 7 Ale and Beer shall be sealed by a standard measure *f. 83*
- 8 No ale or beer received shall be unsealed *f. 84*

A L I E N.

- 1 Living in England owes a local allegiance *50 f. 5*
- 2 He is to be indicted for treason *ibid.*

- 3 Alien, whether in amity or not, who invade the kingdom in a hostile manner shall be tried by martial law *Page 50 f. 6*
- 4 Alien friends may import victuals *480 f. 7*

A M M U N I T I O N.

- 1 By 22 Geo. 2. c. 35. Every person in the fleet who shall waste or destroy an munition shall be punished by court-martial *76 f. 20*

A M E R C I A M E N T.

- 1 How murder was anciently amerced *114, f. 22. 117. f. 2*

A M B A S S A D O R S.

- 1 How they are to be dealt with in cases of treason and other capital offences *31*

A N I M A L S.—*The Law of.* No. 1 to 58.

A N G L E S E A.

- 1 Salop is considered as the next English county *200, 201*

A N N U I T I E S.

- 1 To forge any order, &c. for a hundred annuities is felony with death *207 f. 8*
- 2 Grand Jurors cannot buy or divide *208 f. 11*

A N C E S T O R.

- 1 By 1 Jac. 1. c. 4. the *present* heir shall not be liable to penalties incurred by the *richness* of the ancestor, unless the king had seized two thirds of the lands in the ancestor's life time *30 f. 354*

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- 2 But if the heir be also a recusant the estate is liable to the forfeitures of the ancestor unless he conform *Perd* 30 f. 56
- 3 Lands in the fee tail claimed from ancestor are not liable *ibid.*
- 4 By 33 Hen. 8. c. 39. the heir is chargeable with the debts of his ancestor, &c. *ibid.*

APPLES.

- 1 M. be engrafted 483 f. 17
- 2 The duty on importation 522 f. 1-1
- 3 By what measure to be sold f. 120

APPROVER.

- 1 If any justice shall approve his prisoner he shall be guilty of felony 194

APPEALS.—*See Highways.*

- 1 Whoever *appeals* to Rome in our time *ibid.*
- 2 Such a word commonly made *ibid.*
- 3 A defendant against a plaintiff should appear in person before the court and not by attorney *ibid.*
- 4 If a wife bring a malicious or false accusation she shall be imprisoned till she make satisfaction *ibid.*
- 5 An appeal may be brought *ibid.*

APOTHECARY.

- 1 By 3 Jac. 1. c. 5. no recusant convicted shall use the trade of apothecary 29 f. 27
- 2 Exempted from selling spirituous liquors 461

APPRENTICESHIP.

- 1 By 5 Eliz. c. 4. no person shall exercise a trade nor employ any person therein unless he has served seven

- years as an apprentice, upon pain of 40 s. a month *Reg. c. 564. c. 90*
- 2 Contractions upon the above statute 565 (N)

ARCHBISHOP.—*See Henry. Bishop.*

ARMED and DISGUISED.

- 1 Whoever, being armed and disguised, shall assault out of a river or pond, or rescue an offender shall suffer without clergy 222 f. 4
- 2 Or shall appear in any inclosed place where deer are kept—or in any high road, &c. or shall destroy any fallow deer, or rob any warren 187 f. 2
- 3 Or shall assemble to the number of three, for the purpose of smugling 227 f. 1
- 4 In what manner the offender must be armed 228 (N)

ARREST.

- 1 An arrest not performed shall not subserve to an action *ibid.*
- 2 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 3 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 4 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 5 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 6 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 7 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
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- 9 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12
- 10 If a man be arrested by a constable, he shall be kept in custody till he be bailed 187 f. 12

ARMS and HARBOUR.—*See 27 Jac.*

- 1 By 2 Eliz. 3. whoever shall sell or give arms or munition shall be imprisoned 20 f. 4
- 2 The power of justices upon this act 207 f. 5
- 3 By 3 Jac. 1. c. 5. No papist recusant convicted shall keep arms, &c. 36 f. 17
- 4 By 31 Eliz. c. 4. whoever shall embrozzle the king's armour to the amount *P. 4*

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amount of 20 s. shall be guilty of felony
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ARSENALS.

- 1 By 12 Geo. 3. c. 24. whoever shall damage or destroy the king's arsenals shall suffer death without clergy 75 f. 19

ARSON.

- 1 Is maliciously burning the house of another 165 c. 39
- 2 Not only a mansion, but any house, with the out-buildings may be subjects of this offence 166
- 3 So also barns full of corn whether adjoining the house or not f. 1
- 4 And the word *domus* is sufficient without *mansionals* *ibid.*
- 5 But burning the *frame* of a house or a *stack* of corn is not arson f. 2
- 6 But by 5 Eliz. c. 13. to burn corn in the four northern counties is felony without clergy *ibid.*
- 7 And by 22 and 23 Car. 2. c. 7. to burn in the night corn, grain, hay or barns or other house is felony *ibid.*
- 8 It is not arson to burn a house of which a man is in possession, or seized in fee, even though in a town and with intent to burn other houses (but a pauper may be guilty of this offence for burning the publick work-house, &c.) f. 3
- 9 For no intention to do an injury is felonious *ibid.*
- 10 But it may be punished as a misdemeanor *ibid.*
- 11 And barely sitting the house on fire, will not constitute this crime, unless it *burn* 167 f. 4.
- 12 If a man burn the house of *A.* and thereby happen to burn the house of *B.* he may be indicted for burning the house of *B.* *ibid.* f. 5
- (C) MALICIOUS INCENDIARIES *app.* 4 223
- 13 By 37 Hen. 8. c. 6. f. 4. to burn any cart loaded with fuel incurs 10 l. and treble damages 223 ap. 4

14 By 4 and 5 W. and M. c. 23 to burn the *covert* for red or black game within the time specified, imprisonment for one month, &c. *P.* 223 f. 2

15 By 28 Geo. 2. c. 19. to burn the *covert* for deer or game, any sum between 5 l. and 40 s. *ibid.*

16 By 1 Geo. 1. c. 48. to burn any wood or coppice is felony 224 f. 3

17 By 9 Geo. 1. c. 22. to burn any house, barn or out-house, or any hovel, cock, mow, or stack of corn, straw, hay or wood, or to rescue an offender is felony without clergy *ibid.* f. 4

18 A prison within the protection of this act *ibid.* (N) 1

19 But a lessee for years cannot be guilty by burning the house in which he is in possession *ibid.* (N) 1

20 How a *declaration* and an *indictment* differ, upon this act *ibid.* (N) 2

21 By 10 Geo. 2. c. 32. to set fire to any coal-mine, felony without clergy *ibid.* f. 5

22 By 9 Geo. 3. c. 29. to burn any mill, felony without clergy; but the prosecution must be within eighteen months *ibid.* f. 6

23 For other offences by burning *ibid.* (N)

ARTIFICERS.

1 The offence of seducing them 558 c. 87

2 By 5 Geo. 1. c. 27. to seduce artificers in wool or metal, or any clock or watch maker into any foreign country incurs a penalty of 100 l. and three months imprisonment f. 1

3 The court can inflict but *one* penalty on *one* information, although against several offenders *ibid.* (N)

4 Or if such artificer, using his trade abroad, shall not return home on notice given him he shall lose his *liberam legem*, &c. f. 2

5 On complaint to a justice that any person is endeavouring to seduce such artificer, &c. he may bind him over to the quarter sessions, and on conviction he

A TABLE OF PRINCIPAL MATTERS.

- he shall be imprisoned till he gives security *Page 559*
- 6 By 23 Geo. 2. c. 13. to seduce any manufacturer in wool, mohair, cotton or silk, &c. or any artificer as above mentioned, incurs a penalty of 500*l.* and imprisonment for twelve months for the first offence, and 1000*l.* and two years for the second *f. 4*
- 7 A coach spring maker is within this statute *f. 5*
- 8 By 22 Geo. 3. c. 60. to seduce any workman in the printing calicoes, mullins, cottons, &c. incurs the same punishment 560
- 9 By 25 Geo. 3. c. 67. to seduce any person employed in the iron and steel manufacture; or in the making of the tools and utensils incurs the same punishment *f. 7*

A S S E R T I O N.

- 1 To assert that both or either house of parliament have a legislative authority without the king is *premunire 86*
Vide Speaking.

A S S A U L T and B A T T E R Y.

- 1 An assault is an attempt, with violence, to do a corporal injury to another 263 c. 62
- 2 As by striking at him; or pointing an offensive weapon; holding up a nail, &c. or any other act done in an angry manner *ibid. f. 1*
- 3 But no words whatsoever can amount to an assault *ibid.*
- 4 An offender may be found guilty of the assault and acquitted of the battery *ibid.*
- 5 A battery is any injury actually done to the person of another; as spitting in his face; treading on his toes; jostling him in a revengeful manner *ibid. f. 2*
- 6 Every battery includes an assault; therefore if the assault be ill laid and the battery good, it is sufficient *ibid. f. 1*

- 7 It is no battery for an officer to lay his hand gently upon the person he is about to arrest *Page 264*
- 8 How a battery may be justified *ibid. f. 3*
- 9 *Son assault demesne* may be taken advantage of on an indictment, as well as in an action; it may be given in evidence under not guilty in the first and must be pleaded, specially in the latter *ibid.*
- 10 How assaults and batteries are punished 264 f. 4
- 11 Assaulting peers or members of parliament *ibid. f. 5*
- 12 Assaulting clergymen *ibid. f. 6*
- 13 Assaulting a master or mistress *ibid. f. 7*
- 14 Assaulting a privy councillor *ibid. f. 8*
- 15 Assault for money won at play *f. 9*
- 16 Assaulting in the streets with intent to spoil cloaths 265 f. 10
- 17 To assault by shooting at another *ibid. f. 11*
- 18 Assaulting with intent to rob *ibid. f. 12*
- 19 Assaulting a master woolcomber, &c. *ibid. f. 13*
- 20 To assault or threaten an adversary for suing him, or the attorney, counsel, or jurors in the cause, or a gaoler for detaining a prisoner is a contempt 90 f. 14
- 21 A prisoner assaulting his gaoler may be lawfully killed by him in the affray 107 f. 13
- 22 In a *bare assault* upon a house, if the owner fling out his money it is no burglary 160 f. 3
- 23 But otherwise if upon the assault the door be opened and he enter the house 161
- 24 To assault with intent to hinder the exportation of corn, &c. is a misdemeanour 243

A S S E M B L Y.—*Vide Riot.*

- 1 An unlawful assembly is a disturbance of the peace by persons barely assembling 237
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| <p>2 An assembly of a man's friends for the defence of his person, &c. is unlawful <i>Page 29</i></p> <p>3 But such an assembly in a man's house for the defence of it is lawful <i>f. 10</i></p> <p>4 How unlawful assemblies shall be suppressed, &c. <i>f. 11</i></p> | <p><i>seisnam</i> falsely reciting a recovery <i>Page 543 f. 32</i></p> <p>6 As where he brings a <i>procur</i> against a poor man, who had no title, in order to get possession <i>f. 33</i></p> <p>7 Or if he appear and confess judgment without warrant <i>f. 34</i></p> <p>8 Or pleads a false plea to impose on the court <i>f. 35</i></p> |
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ASPORTAVIT.—*Vide Larceny.*

- 1 Is essential to every indictment for larceny *134 f. 2*
- 2 What shall be said a sufficient *asportation* *135, (N) 139 f. 18*

ASSIZE.—*Vide Brevet.*

ASSURANCE.

- 1 To forge or counterfeit the common seal, &c. of the London or Royal Exchange Assurance Office felony without clergy *207 f. 14*
- 2 Deceiving a ship to obtain the insurance felony without clergy *185*

ATTAINDER.

- 1 Anciently it was *that* that any one might kill an attainted person *160 f. 8*
- 2 But it is now determined to be murder *121 f. 15*
- 3 An attainder in piracy corrupts the blood *153 f. 7*

ATTORNEYS.

- 1 An attorney may prosecute or defend in the court where he is enrolled on a *procur* *542 f. 23*
- 2 He may lay out his own money in the cause and maintain an action to recover it *ibid.*
- 3 How they may proceed in other courts *ibid.*
- 4 If any attorney be guilty of deceit, collusion or imputation he shall be disqualified and imprisoned *542 f. 29*
- 5 As to the fact out an *habere fac.*

ATTEMPT to ROB.

- 1 By 7 Geo. 2. c. 21. whoever shall assault another by menace, or in a violent manner demand their property with an intent to rob shall be transported for seven years *148*
- 2 How the offence must be laid and proved *ibid. (N) 2*

AVOIRDUPOIS WEIGHT.—*See Brevet.*

AUDITA QUERELA.

- 1 Confirmity upon 1 Jac. 1. c. 4. is a good bar on an *audita querela* against an informer *504 f. 53*

AUTHORS.

- 1 By 8 Ann. c. 19. author or their assigns shall have the sole right of printing their work for fourteen years, &c. *470*
- 2 A musical composition is within the *ibid. (N)*
- 3 An abridgment, or an index may be within it, but *quere* as to a chart *ibid.*
- 4 But every volume before publication must be entered in Stationer's Hall, in the manner described *f. 25*
- 5 And nine copies shall be left there for the universities, &c. *f. 26*
- 6 And after the expiration of the said fourteen years the right shall return to the authors, *if living*, for another fourteen years *477 f. 37*
- 7 The case of literary property *(N) 7*
- 8 Mode*

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- 8 Mode of assigning the property so as to protect the contingent interest of authors Page (N) 7
- 9 By 8 Geo. 2. c. 13. the property of engravings is secured to their inventor, for fourteen years 477 f. 28
- 10 But the ~~name~~ of the proprietor, and the day of publication must be engraved on the plate (N) 1
- 11 By 17 Geo. 3. c. 57. proprietors of prints may bring an action on case, &c. for altering, adding to, or diminishing the prints 478
- 12 By 15 Geo. 3. c. 53. the universities and colleges may print their own books, &c. at their own press f. 29

AVERMENT.—*Indictment.*

B.

BACON and PORK

- 1 Imported may be seized. P. 500 f. 108
- 2 At what prices they may be exported. f. 108
- 3 May be exported although they do not exceed the price mentioned. f. 111
- 4 How they may be reported to be in import with the crown. f. 111
- 5 The duties to which they are subject. f. 112 to 113

B A I L.

- 1 A justice of the peace may either bail or commit one who has dangerously wounded another, till the next day be past; but he ought to be cautious if he would be dangerous. 270
- 2 A justice of the peace cannot bail in his office *per sequestum* or *per assignationem*, but must commit till the assizes; but the offender may be brought up by *habeas corpus* and bail. 114
- 3 Anciently they might have been bailed by 12 men upon the writ *de alio et alio*. f. 24
- 4 Whoever is bailed for another may take care to have his appearance recorded,

without being guilty of maintenance

Page 539 f. 19

- 5 By 21 Jac. 1. c. 26. to acknowledge, or procure to be acknowledged, any recognizance, bail, &c. in the name of any other person without their consent, is felony 173 f. 9
- 6 In putting in bail before a judge, if a man *perjurate* another in one county, and the bail be filed in another, the trial shall be where the perjurating was committed. 179
- 7 The bare perjurating or acknowledging is no felony, but a misdemeanour, unless the bail be used *ibid.*
- 8 Bail put in in *forged names*, and no such persons exist, the offender cannot be prosecuted for perjurating; but he may be set in the pillory 179. (N) 1
- 9 By 4 & 5 W. & M. c. 1. perjurating bail, before commissioners authorized to take bail in actions depending in the courts at Westminster, by which the person perjured shall be made liable to pay, &c. is felony. 179 f. 11

B A I L I F F.

- 1 Of a corporation is within 15 C. 1. c. 1. f. 108
- 2 By 5 C. 1. c. 2. he shall not be appointed without a place of occupation in the county in his *own name*, &c. f. 105
- 3 By 8 Hen. 6. c. 9. 1. shall of a *mayor*, &c. not returning the king's writ upon forcible entry, shall forfeit 277 f. 11

B A I L M E N T.

- 1 *Bailment* of goods to another for a special purpose, gives the bailor such a *property* of them that he cannot be guilty of felony in stealing them while the *possession* continues. 133 f. 3
- 2 But if the bailor take away part of what is bailed to him, he may be guilty of felony, for his *possession* was of the *whole*, as one entire thing, and not of any distinct and separate part. 135
- 3 The *bailment* also must be fairly and honestly obtained; for, if it appears

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to have been acquired with a felonious intention at the time, in such case although the owner *actually* delivered the goods, yet *constructively* he still retained the possession of them Page

135, 137

4 But if the *bailment* be originally fair and *bona fide*, and the felonious design is hatched in the mind of the bailee subsequent to the delivery of the goods, he is not guilty of larceny, but of a bare breach of trust, by taking them away. *ibid.*

5 If a person has only the bare charge of goods, or the special use of them, as a shepherd of sheep, a butler of plate, &c. this is not a *bailment*, which changes the *possession* of the owner. 136 f. 6

6 The *possession* and the *property* are both delivered to the bailee by a proper *bailment*; but when the purposes of the *bailment* are performed, the bailee is divested of the *possession*; and if he then take away the *property*, feloniously, it is larceny f. 7

7 A *bauler* may be guilty of felony in taking his own goods from his *bailee* 145 f. 30

woods, &c. shall be punished as directed by 6 Geo. 1. c. 4. Page 192

2 By 22 Hen. 8. c. 11. to destroy certain banks in Norfolk is felony. 198

3 By 10 Geo. 2. c. 32. to cut off, draw up, or remove any piles, &c. for securing banks made to prevent the adjoining lands from being overflowed incurs a penalty of 20 l. 199 f. 5

4 All the provisions of the *Black Act* shall extend to offences against any bank, or banks of rivers, or sea-banks, &c. 200

5 By 6 Geo. 1. c. 2. whoever shall cut down the banks of any river or any sea bank whereby the lands shall be overflowed shall be guilty of felony without clergy. f. 7

6 By 27 Geo. 2. c. 19. whoever shall destroy any bank, &c. for benefiting Bedford level shall suffer death without clergy f. 8

7 By 4 Geo. 3. c. 12. whoever shall destroy any banks to any navigation erected by parliament so as to impede the same may be transported for seven years f. 9

8 For breaking the banks or dams of private fisheries. *ibid* f. 1.

9 By 15 and 16 Geo. 2. c. 35. to destroy flarr or bent, planted to preserve sea banks 205

B A K E R S. — *Vide Bread.*

1. By 2 & 3 Ed. 6. c. 15. bakers are punishable for conspiring to raise the price of victuals. 481 f. 10

2 May bake victuals for dinner for their customers on a Sunday 11

5 But they cannot bake loaves of bread or rolls in the usual way of their trade *ibid.*

B A I L A S T.

1 By 19 Geo. 2. c. 22. the ballast of ships not to be cast out in the harbour 200 (N)

2 Heaving it on the Thames, a penalty in lieu of transportation 248

B A N K S.

1 By 6 Geo. c. 16 whoever shall destroy banks, as fences, to certain

B A N K E N G L A N D.

By 15 Geo. 2. c. 13. if any officer of the bank entrusted with any of the effects of the company, or the effect of any other person therein deposited, shall, secrete, embezzil, or run away with the same or any part thereof, he shall be guilty of felony without clergy 139

2 By 8 and 9 Will. 3. c. 20. to forge the seal of the bank, or any note signed by the bank—felony without clergy 205

3 By 11 Geo. 1. c. 9. whoever shall forge, alter, erase, utter, or exchange any bank note, shall suffer as in cases of felony *ibid.*

4 By 12 Geo. 1. c. 32. to forge the name of any of the cashiers of the bank. *ibid.*

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bank is felony without clergy. *Page*
205 f. 3

5 By 15 Geo. 2. c. 13. to alter any note or obligation under the seal of the bank, or to demand the money for the same, &c. felony without clergy f. 4

6 By 13 Geo. 3. c. 79. to make or cause to be made or to have unlawfully the possession of any frame, &c. for making paper, with the words, *Bank of England* visible in the substance; or to make any such paper, or to cause, by any act, the words *Bank of England* to appear in any paper is felony without clergy
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7 And whoever shall engrave, &c. upon any plate, &c. any note or bill, or any part thereof, containing the word *BANK OF ENGLAND* or *BANK POST BILL*, or any words expressing the sum, &c. of such note in white letters or figures on a black ground; or shall use such plate, &c. or have the same in their custody; or shall utter such note, shall be committed to goal for six months f. 6

BANKRUPTS.

1 Who shall not within forty two days after notice of the commission, surrender to the commissioners, and submit to be examined, upon oath, and disclose their whole estate and effects, and deliver up all their books and papers: or who shall embezzle to the amount of 20*l.* are guilty of felony without clergy 203

2 But the statute must be strictly pursued in the commissioners commitment; and a court of equity will not assist a prosecution for this offence by ordering the officer to attend with the papers, &c. *ibid.* (N) 2

3 But the chancellor may enlarge the time not to exceed fifty days from the end of the forty two days 204

4 Any trustee or other person who shall conceal the effects of a bankrupt shall forfeit 100*l.* *ibid.* f. 3

5 A bankrupt may be apprehended if he is likely to abscond *ibid.* (N) 1

BANNES.—*Vide Marriage.*

BAPTISM.

1 By 3 Jac. 1. c. 5. Popish recusants neglecting to baptize their children within one month after their birth by a lawful minister, &c. forfeit 100*l.*

Page 37 f. 22
2 Dissenters need not subscribe to those of the 39 articles concerning infant baptism. 17 f. 2

BARGAINOR.

1 By 8 Geo. 2. c. 6. to forge any entry of the acknowledgment, in bargain and sale in the county of York, by which any freehold shall be affected incurs the penalties of 5 Eliz. f. 19

BARONS

1 Of the exchequer *as such* are not within the statute of treasons 61 (N) 12

BARK.—*Vide Trees. Freehold.*

BARRATRY.

1 A barrator is a common mover or maintainer of suits 524 c. 81

2 Every thing whereby disquiet may grow among neighbours is barratry 525 f. 2

3 But no number of false actions brought by a man in his own right will make him a barrator f. 3

4 Nor can an attorney be a barrator for maintaining a groundless action f. 4

5 There must be more than one act for the charge is *communis barrator* f. 5

6 *Quere* if a *feme covert* can be guilty of this offence f. 6

7 By 34 Edw. 3. c. 1. justices of the peace may hear and punish this offence f. 7, 8

8 Na

A TABLE OF PRINCIPAL MATTERS.

- 10 Instances in which this surety has been taken *Page 262 (N) 1*
 11 A recognizance for such surety may be forfeited by a commission of the offence intended to be prevented by it *f. 5.*
Vide Contempts, No. 16. 20.—Conspiracy, No. 20.

B E G G A R S.

- 1 Soldiers or sailors wandering as beggars without a testimonial from a justice shall be guilty of felony without clergy. *183 c. 48*
 2 Beggars pretending to be soldiers or sailors shall be deemed rogues and vagabonds *184 f. 6*
 3 All persons going about from door to door, or placing themselves in streets, highways, or passages, to beg or gather alms in the parishes or places where they dwell are to be deemed idle and disorderly persons *5*
 4 One justice may, on conviction by one witness, &c. &c. commit such offender to hard labour for a month. *ibid.*
 5 Any person may apprehend such beggars and carry them before a justice, if they resist or escape, they shall be punished as rogues and vagabonds *ib.*
 6 The justice may order the overseer of the parish to give the person apprehending such beggar a reward of 5s.
Vide Vagrants. ibid.

BELL METAL, — *Vide Stolen Goods.*

BENEFIT OF CLERGY. *Vide Felonies.*

B E N T.

- 1 By 15 and 16 Geo. 2. c. 33. whoever shall destroy bent on the sea coasts shall forfeit 20s. *ibid.*

B I G A M Y.

- 1 By 1 Jac. 1. c. 11. if any married person, shall marry another person, the former husband or wife being alive, that be guilty of felony *174*

- 2 The offenders may be tried in the county where they are apprehended but it is no felony *Page 174*
 3 If the husband or wife shall be continually remaining beyond the seas by the space of seven years together. *f. 2*
 4 Or shall be absent the one from the other for the space of seven years, within the kingdom, the one not knowing the other to be alive within that time. *ibid.*
 5 Or if either of them shall be divorced or the marriage declared void by the spiritual court at the time of the second marriage. *f. 3*
 6 Or if either of the parties are within the age of consent. *ibid.*
 7 But this offence shall not incur attainder, corruption of blood, loss of dower, or disinheritance *f. 4*
 8 A divorce, a vinculo matrimonii, or also a mensa et thoro causa adulterii or fornicationis is within the exception of this statute. *f. 5*
 9 Where one of the parties is within the age of consent, the other is thereby also exempted from the felony. *f. 6*
 10 If the first marriage be beyond sea, and the latter in England, the party may be indicted for it in England *f. 7*
 11 And *quere* if he may not though the first marriage be in England, and the second beyond sea *f. 8*
 12 The first and true wife is not an admissible evidence against her husband *175 (N) 1*
 13 She cannot even make an affidavit to postpone the trial. *ibid.*
 14 But the second woman is a competent witness. *ibid.*
 15 A second husband, without privity of the first marriage, is intitled to the profits of the woman's industry *ibid.*
 16 The production of the sentence in a suit for justification does not preclude the proof of the marriage *(N)*
 17 If such a sentence were conclusive evidence against the fact of marriage, yet it may be impeached by fraud or collusion. *ibid.*

Vide Marriage.

BILL:

A TABLE OF PRINCIPAL MATTERS.

BILLS.—*Vide Forgery. Chafes in Action.*

- 1 By 2 Geo. 2. c. 25. it is felony without clergy to forge, or cause to be forged, or to assist in forging, any bill of exchange or promissory note for the payment of money, or any indorsement thereon. *Page 210 f. 16.*
- 2 And by 7 Geo. 2. c. 22. to forge, &c. any acceptance, or number, or principal sum thereon. *241 f. 18.*
- 3 So also by 31 Geo. 2. c. 10. to forge, &c. any bill to receive the monies due to any seaman, &c. *212 f. 21.*
- 4 Or by 9 Geo. 3. c. 30. knowingly to utter the same. *ibid.*

BILLS OF MORTALITY.—*Vide page 233. Chairman. Cattle No. 8. 21. Breed.*

BILLINGSGATE.—*Vide Nuisances.*

BIRCH.—*Vide Trees.*

BISHOP.—*Vide Præbend. Popey.*

- 1 Every bishop may convict for heresy within his own diocese, and proceed to punish by church censures. *6 f. 4.*
- 2 But no other spiritual judge can. *ibid.*
- 3 By 24 Hen. 8. c. 9. the archbishop of either province may cite the offender, if the immediate ordinary consents, or if he neglects his duty. *f. 5.*
- 4 By 11 and 12 Will. 3. c. 4. whoever shall convict a *papist bishop* of saying mass, shall receive 100 l. and the offender be condemned to perpetual imprisonment.—But this is repealed by 18 Geo. 3. c. 60. provided the offender shall have taken the oath therein prescribed before any prosecution commenced. *39 f. 2.*

BITCH.—*Vide Dog.*

BLACK ACT.

- 1 By 9 Geo. 1. c. 22. it is felony without clergy to appear, ARMED AND DISGUISED in any inclosed grounds where deer, hares, or conies are usually kept. *Page 187.*
- 2 Or in any high road, open heath, common, or down. *187 f. 2.*
- 3 Or to hunt, wound, destroy, or steal any fallow deer. *ibid.*
- 4 Or to rob any warren where hares or conies are usually kept. *ibid.*
- 5 Or to steal or take away any fish out of any river or pond. *222 f. 4.*
- 6 It is also felony without clergy, whether armed and disguised or not to hunt, wound, destroy or steal any fallow deer in any of the king's inclosed parks or forests. (*See Vide 16 Geo. 3. c. 30. p. 189.*) *187.*
- 7 Or to break down the head of any fish-pond whereby the fish shall be lost or destroyed. *212 f. 4.*
- 8 Or to kill, maim, or wound any cattle. *180 f. 2.*
- 9 Or to cut down or destroy any trees planted in any avenue or growing in any garden, orchard, or plantation, for ornament, shelter or profit. *215 f. 4.*
- 10 Or to set fire to any house, barn, out-house, or to any hovel, cock, mew, a stack of corn, straw, hay, or wood. *224 f. 4.*
- 11 Or to maliciously shoot at any person in any dwelling-house or other place. *225.*
- 12 Or to send any letter, without any name subscribed thereto, or signed with a fictitious name demanding money, venison, or other valuable thing. *220 f. 3.*
- 13 Or to forcibly rescue any person, in custody for any of the above offences. *224 f. 4.*
- 14 Or to procure, by gift or promise of reward, any person to join in committing any such unlawful act. *ibid.*
- 15 Any two justices may receive information on the oath and subscription of one witness, which they shall transmit to a secretary of state, who

A TABLE OF PRINCIPAL MATTERS.

is to lay the same before the king and council, where an order may be made for the offender to surrender himself, after proclamation at two market towns, at the time and in the manner directed by the act; and if he neglect to surrender he shall be deemed convicted of felony without clergy; and the king's bench or goal delivery, on production of the order of council, may award execution against the offender.

Page 187 f. 83

16 And whoever shall *abet* an offender after the time limited for his surrender is expired, shall, on conviction, be guilty of felony without clergy. 183 f. 4

17 But the surrender clause shall not supersede the power of magistrates to apprehend the offender by the ordinary process of law. 185 f. 5

18 But if he is apprehended by the ordinary process, it shall *avert* the consequences of the surrender clause, and the offender shall be tried by the common law.

19 The hundred is made liable to the extent of 200*l.* for the offences mentioned, No. 8, 9, 10.

20 But the persons injured must give notice to some of the inhabitants, within two days after the offence is committed and be examined within four days after, touching their knowledge of the offence.

21 The action to be within one year; and if the offender be convicted within six months after the offence, the hundred is exonerated.

22 Justices may issue their warrants to search for stolen venison.

23 Persons wounded, or if killed, their executors, &c. are entitled to go for apprehending and convicting an offender.

24 The act to be openly read at the quarter sessions, &c.

N. B. For the clauses not referred to in the book see, *vide the act.*

BLACK LEAD.

By 25 Geo. 2. c. 10. to enter a black lead mine by force, and take away

wad, cawke, or lead, &c. their aiders and abettors shall be transported for seven years, or whipped. P. 218 f. 12

BLASPHEMY.

1 All blasphemies against God, or contumelious reproaches of our Saviour, are offences at common law, punishable by the temporal judges with fine, imprisonment, and infamy. 10 f. 1
Vide Religion.

BLOOD.—*Vide Corruption of Blood.*

BLACK MAIL.

1 By 43 Eliz. c. 13. whoever inhabiting near the borders of Cumberland, Westmorland or Durham, shall take any persons or goods and imprison them till ransom made, &c. &c. shall suffer death without clergy. 201

BLUDGEON.—*Vide Vagrants.*

1 By 73 Geo. 3. c. 88. a person apprehended with a bludgeon or other offensive weapon upon him, with intent feloniously to assault another, shall be deemed a rogue and vagabond. 148

B O A T S.

1 By 10 Geo. 2. c. 31. no person shall carry in a *tilt boat*, &c. more than 37 passengers and 3 by the way. Nor in any *other boat*, more than 8 passengers and two by the way. Nor on a Sunday more than 8 persons over the ferry. 569

2 And if any greater number shall be taken, and any passenger in a boat *so surcharged* shall be drowned, the navigator of the boat shall be transported as a felon. 57

3 No person shall use any boat or barge on a Sunday without the allowance of

A TABLE OF 'PRINCIPAL MATTERS.

of some justice of peace, on pain of
5 l. Page 11 f. 3

- 4 But 40 watermen may be appointed
by the Watermens Company to ferry
boats over the Thames on a Sunday. 12

*Vide 2 Geo. 3. c. 28. for thefts by bum
boats on the Thames.*

B O N D.—*Vide Usury, Extortion*

- 1 Stealing an obligation is not within
21 Hen. 8. c. 7. 139 f. 14

- 2 Nor is the stealing a bond, felony by
the common law. f. 22

- 3 But by 2 Geo. 2. c. 25. the stealing
of bonds and certain other choses in
action, is made such felony as steal-
ing the property they secure would
be. 142

- 4 Those who have an equitable interest
in a bond, may maintain another for
the recovery of it. 539 f. 17

- 5 A bond is within 29 Eliz. c. 6. which
authorizes the king to take the goods
of a person absenting himself from
church on default of paying the 20 l.
a month. 22 f. 14

- 6 By 9 Ann. c. 27. to forge South Sea
bonds is felony without clergy.
208 f. 11

- 7 By 7 & 8 Will. 3. bonds given to pro-
cure the return of a member to parlia-
ment, are void; and the giver there-
of shall forfeit 300 l. 314 f. 8

- 8 A bond, by a deputy to pay a cer-
tain sum at all events, is bribery, and
void. 313

- 9 But not a bond to pay half the profits,
or a certain sum out of the profits of
the office for a deputation. f. 5

- 10 The obligee may raise out *libris* and
insert *marcis*, without being guilty of
forgery. 337 f. 4

- 11 By 2 Geo. 2. c. 25. to forge any
bond or writing obligatory is felony
without clergy. 210 f. 16

- 12 To make a bond for 500 l. seem to
be a bond for 5000 l. by adding ano-
ther cypher was forgery at common
law. 336 f. 2

- 13 But forging a bond containing
mere gift of personal chatels is not
within 5 Eliz. 342 f. 21

B O N A.

- 1 *Bona capellæ* is a good description in
an indictment for stealing the goods
of a chapel; *bona domus et ecclesiæ*
for stealing the goods of an abbey;
bona parochianorum for stealing the
goods of a parish church. Page 144
*Vide goods and chattels. Indictment. Res-
titution.*

B O O K S.

- 1 By 3 Jac. 1. c. 5. no person shall
import, print, buy, or sell any Popish
books on penalty of 40 s. for every
book, and the books to be burnt. 46
f. 15

- 2 The 8 Ann. c. 19. made to encourage
the writing of useful books. 475 f. 24

- 3 The author of any book or his assigns,
shall have the exclusive copy-right for
14 years, to commence from the day
of publication; and whoever shall in-
vade that right shall forfeit all the im-
pressions and one penny for every
sheet found in his custody. 476

- 4 A musical composition is a *book* with-
in the meaning of this act. *ibid.* (N)

- 5 But the author may consent, by writ-
ing in the presence of two witnesses,
that another shall print such books.
ibid.

- 6 But this act shall not extend to any
book or books printed without such
consent, unless the title to the copy of
the whole of such books be registered
at Stationers' hall. 476 f. 25

- 7 Direct how the same shall be re-
gistered, if the clerk of the company
refuse to register, he shall forfeit 20 l.
and the author, on publishing the
same in the gazette shall have the
same benefit as if the work had been
registered. *ibid.*

- 8 Nine copies of all books so registered
shall be left at Stationers-hall for the
use of the Universities, &c. f. 26

- 9 After the first 14 years the copy-right
shall return to the authors, if living,
for another 14 years. f. 27

Q q 2

10 The

A TABLE OF PRINCIPAL MATTERS.

- 10 The sale of literary property; and the mode of assigning copy-right for to protect the contingent interest of authors. *Page 476 (N. 7)*
- 11 B. 15 Geo. 3. c. 53. the Universities of Great Britain; and Eaton, Westminster, and Winchester, shall have *for ever* the exclusive right of printing at their own press, their own books. *173 f. 29*
- 12 But they may sell the copy-right in like manner as any author. *Ibid.*
- 13 The king may grant the exclusive right of printing the scriptures and law books.

BORDERERS.—*Vide Black Mail.*

- 1 For the offences of black mail. And of mob troops, &c. *Vide 200 to 202*

BRAWLING.—*Vide Affrays.*

- 1 A *ferri court* may be indicted at *communiis tractibus*. *5 (N) 19*
- 2 B. 5 an. 6 Edw. 6. c. 4. whoever

yard, the ordinary, on oath by two witnesses may suspend a layman as *ingressu ecclesie*, and a clerk from *ministracion*. *271 f. 53*

- 3 This is a distinct and substantial offence; in the punishment of which, the spiritual court shall not be prohibited except they proceed to damages. *272 (N)*
- 4 Church-wards and their burying places are within this statute. *Ibid.*

P R E A R.

- 1 In setting the assize, respect shall be had to the price of grain, &c. in the public markets. *486*
- 2 Where there is an assize, only wheat and household bread, or such bread as shall be allowed, shall be sold. *487*
- 3 The assize and price of bread shall be according to the tables. *Ibid. f. 7*
- 4 Explanation of the tables. *487 to 490*

- 5 The assize to be in avoirdupoise weight. *Page 491*
- 6 A return to be made weekly to the court of aldermen of London of the prices of grain, &c. in the London market, to be entered in a book for the inspection of the bakers. *f. 10*
- 7 And the assize shall be set the next day by the said court, if sitting; if not by the lord mayor. *Ibid.*
- 8 The meal-weighters shall leave a copy of the return at Bakers Hall. *Ibid.*
- 9 The flour power, &c. given to the court of aldermen of every other city, who shall cause the grain, &c. to be returned and *within two days* shall set an assize to continue in force for *seven days*. *492*
- 10 In each city, two justices are authorized to set an assize, &c. *f. 13*
- 11 Bakers may demand the return of the prices of grain in order to enable them to bring to the assize. *f. 13*
- 12 No baker shall pay any fee for an assize. *f. 14*
- 13 If a bushel of four quarters loose of wheat and fourfold old to weigh in proportion to the present assize, &c. *495*
- 14 Wheat and barley may not be allowed, no peck, nor a peck or quarter loose if it be sold. *f. 16*
- 15 The justices may fix the jurisdiction of any place within their district. *f. 17*
- 16 An entry of the prices of grain, &c. to be made by every clerk of the market. *f. 18*
- 17 But no alteration shall be made in the price of bread unless the price of grain shall vary 3d. per bushel from the last return. *494 f. 19*
- 18 Forfeiture on every meal weighter who shall neglect his duty, and on every officer who had above. *f. 20*
- 19 Penalty for refusing to disclose the true price of grain, or for giving in a false price. *f. 21*
- 20 If a false return or price shall be suspected, the magistrates may examine the party and fine him *10 l.* *495*
- 21 But the party summoned shall not be obliged to travel above five miles from his place of abode. *Ibid.*

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- 22 Bakers shall make the bread of such weight, goodness, and price as shall be directed on pain of 40s. *Page 501 f. 25*
- 23 Penalty for adulterating bread. *f. 26*
- 24 Penalty for adulterating corn. *f. 25*
- 25 Penalty where the bread shall be of a different mixture of corn than what it imports. *f. 26*
- 26 Penalty for making bread under weight. *f. 27*
- 27 Every loaf of wheaten bread to be marked W. and every loaf of household H. *f. 27*
- 28 Bakers, taking higher than the fixed price, or refusing to sell their bread for less than 10d. and 40s. *f. 29*
- 29 Bread to be sold to whomever not to be higher than household. *f. 30*
- 30 Any magistrate, or peace officer by warrant, may search the houses of bakers, for bread wanting weight, or adulterated, and may seize the same. *f. 31*
- 31 If a baker is convicted of such offence, he shall be liable to a fine of 10s. *f. 32*
- 32 The consumer shall not be liable to exceed a price of 10d. for a loaf. *f. 33*
- 33 And the magistrate may cause the baker's name to be published. *f. 33*
- 34 Whoever shall oppose or hinder such a search shall forfeit not exceeding 5s. *f. 34*
- 35 But no miller, machiner, or baker shall take a more than 10d. for a loaf. *f. 35*
- 36 How madder may be recompensed who pay penalties for the default of the servants. *f. 36*
- 37 Offences may be heard and determined summarily. *f. 37*
- 38 How the penalties shall be applied. *f. 38*
- 39 Magistrates authorized to summon witnesses. *f. 39*
- 40 No *certiorari* to be allowed. *f. 40*
- 41 The manner in which persons aggrieved may appeal to the full court. *f. 41*
- 42 If the conviction be within six days of the session, the party grieved may appeal to the subsequent session. *f. 42*
- 43 Limitation of actions. *f. 43, 47*
- 44 By 3 Geo. 3. c. 11. although no affize be set, no loaf such as affized and priced leaves are ordered to be made at the same time and in the same place. *Page 501 f. 48*
- 45 But the session may order the sort of bread which shall be made. *f. 49*
- 46 The sorts of affized wheaten bread. *f. 50*
- 47 Proportion as to weight between the white and wheaten bread and the wheaten and household affize bread. *f. 51*
- 48 The price of the peck loaf, and half peck, and other subdivisions in the wheaten and in the household bread. *f. 52*
- 49 Every peck loaf shall weigh 17 lb. 6 oz. every half peck 8 lb. 11 oz. every quarter peck 4 lb. 5 oz. every half quarter peck 2 lb. 2 1/2 oz. *f. 53*
- 50 And offenders shall forfeit not exceeding 5s. nor less than 1s. for every ounce wanting, and for less than one ounce not exceeding 2s. 6d. nor less than 6d. *f. 54*
- 51 But such deficient bread may be sold at a discount within 21 days before the next session, and not here within three days. *f. 55*
- 52 No wheaten loaf of a higher price than household bread to be sold on pain of 20s. *f. 56*
- 53 To be marked a loaf. *f. 57*
- 54 Bread made of any other grain than wheat to be impriced with such letters as the justice shall order, &c. *f. 58*
- 55 Justices or peace officers may hear &c. *f. 59, 63*
- 56 By 13 Geo. 3. c. 62. A STANDARD WHEATEN BREAD shall be made. *f. 64*
- 57 Which shall not be sold as *priced* leaves together with *affized* leaves. *f. 65*
- 58 The *affize* table for such bread. *f. 66*
- 59 The price table for the same. *f. 67*
- 60 Which shall be regulated by the laws before mentioned. *f. 68, 76*

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BREACH of the PEACE.

- 1 Seditious words, against religion, are indictable, *as tending to a breach of the peace.* *Pa 110 f. 6*
- 2 In what cases such homicide, as happens in the execution of an unlawful action where the principal design was a breach of the peace, shall be construed murder. *127 f. 46, 49*
- 3 An *ineffectual* attack upon another for the purpose of robbing him, is punishable by fine and imprisonment as a breach of the peace. (*Vide attempt to rob*) *147. f. 3*
- 4 A libel only *tends to* a breach of the peace.

BREACH of TRUST.

- 1 A mere breach of trust is no felony by the common law. *134. c. 33*
- 2 By 3 and 4 W. & M. c. 9. whoever shall steal any of the furniture *let and warranted to* him with any lodgings shall be guilty of felony. *137 f. 10*
- 3 By 21 H. n. 8. c. 7. servants, above eighteen years of age, and not apprentices, who shall go away with jewels, &c. delivered to them by their masters or mistresses to keep to the intent to steal the same, contrary to the trust and confidence reposed in them; or shall, being in the service of their masters, embezzle the same without assent, &c. to the amount of 40^s. are guilty of felony. (Clergy outlawed by 12 A. n. c. 7.) *138 f. 11*
- 4 The offender must have been a servant to the owner of the goods both at the time they were delivered and at the time they were stolen. *f. 12*
- 5 The goods must be delivered to keep; therefore if the servant receive money on his master's account and go away with it, he is not within the act; but otherwise if he receive the goods from another servant, &c. *f. 13*
- 6 Neither a wasting or consuming of goods, nor a *cheating action* are within the act. *f. 14*

- 7 The goods must be the property of the master at the time; but cloaths &c. delivered to the servant no way changes the property. *Page 138 f. 15*
- 8 By 7 Jac. 1. c. 7. manufacturers in woollens embezzling the wool or yarn delivered to them to manufacture shall be whipped, &c. *f. 16*
- 9 By 15 Geo. 2. c. 13. servants of a BANK embezzling the property they are entrusted with, are guilty of felony without clergy. *139, 140*
- 10 By 5 Geo. 3. c. 25. and 7 Geo. 3. c. 56. servants of the post-office embezzling any letter containing a security for the payment of money; or stealing the same out of any letter that shall come to *his post office* shall suffer death without clergy. *140*
- 11 A case upon an indictment on this act. *Id. (N) 4*
- 12 By 17 Geo. 3. c. 56. servant, in a variety of manufacture, are punished as the acts direct, for purloining the property entrusted to them by their employers. *140*

BREAKING.—*Vide Burglary: Forcible Entry.*

B R E W E R S.

- 1 No brewer shall conspire to raise the price of victuals. *481 f. 10*
- 2 No brewer shall use any molasses, curie sugar, or any extract or composition thereof, in the making beer, &c. *512 f. 77*
- 3 Or receive into his custody any quantity of the said materials exceeding 10 *l.* on penalty of 100 *l.* *f. 78*
- 4 Nor shall he use any brewm, wormwood, or other bitter, instead of hops, on pain of 20 *l.* *f. 79*
- 5 Nor any sugar, honey, foreign grains, Guinea pepper, essential hinc, coculus Indicus, &c. on pain of 20 *l.* *f. 80*
- 6 By 2 Geo. 3. c. 14. no brewer, &c. shall be fined for advancing the price of beer in a reasonable degree, and if he shall mix any small beer or worts with

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with small, he shall forfeit 50*l.* Page 481, 482

BRIDGES.

- 1 What particular bridges it is made felony to destroy. 193*f.* 9
- 2 None shall make bridges except by custom. 443
- 3 Persons bound to repair them must make them of sufficient height and strength according to the course of the water. *f.* 1
- 4 No one shall be deemed guilty of trespass for entering lands or laying down materials on the grounds of another, for such purpose. *ibid.*
- 5 The repair of bridges lies upon the county unless such part as is within a franchise, if there be no special tenure or prescriptions to the contrary. *ibid.*
- 6 A corporation or other person may be liable either by tenure or prescription. *f.* 2
- 7 But a man is not bound to repair a new bridge built by himself for the common good. *ibid.*
- 8 But a tenant at will of a house adjoining a bridge is bound to repair his house in respect of his position. (N) 1
- 9 And if a particular district bound to repair one kind of bridge, build another kind, of more general utility, the county shall repair it. 444 (N) 2
- 10 Any individual who is liable to repair a bridge may be made a defendant for not repairing, and shall pay such fine as shall be assessed; but he may have a remedy over against them who are equally liable for their contribution. *f.* 3
- 11 A plea that the defendant is not bound to repair is bad, unless it shew who is so bound. *f.* 4
- 12 If the defendant traverse the charge of repair, the attorney general may take a traverse upon the traverse and *jurare* that the defendants are bound to repair, but no inhabitant shall be upon the jury. *f.* 5, 6
- 13 The indictment must allege the kind of bridge and if the obligation arises from tenure, it must state where the lands lie. Page 444 (N)
- 14 By 22 Hen. 8. c. 5. the sessions are empowered to inquire, hear and determine annoyances of broken bridges in the highways and to order their repair. 445 *f.* 7.
- 15 Where it cannot be known who are bound to repair, bridges without a city or town corporate shall be repaired by the county; if within, then by the city or town; and if the bridge shall be part in city or county and part in another, each shall repair the part accordingly. *f.* 8
- 16 The mode in which assessments shall be made and levied for the repair of bridges. The manner in which the justice may issue process, &c. 446, 447
- 17 Justices may allow the collectors reasonable charges. 447 *f.* 12
- 18 How the highways at the ends of bridges, within the space of 500 feet shall be kept in repair. *f.* 13
- 19 No private bridges are within the purview of the above act. *f.* 14
- 20 How far the power of the justices extends under this act. *f.* 15
- 21 Who shall be considered as inhabitants within the words of the act. 449 *f.* 16
- 22 The assessment to be made distinctly on each inhabitant. *f.* 17
- 23 From which no inhabitant can claim any exemption not even by charter or act of parliament. *f.* 18
- 24 It is questionable whether a borough which hath no bridge be not liable to contribute to the repair of the county bridges. *f.* 19
- 25 By 1 Ann. c. 18. the sessions upon any decayed bridge being presented, may levy a tax for the repair. *f.* 20
- 26 All questions concerning the repair of bridges shall be determined in the county where they lie. 405
- 27 Except the right of repair either to private persons or parishes shall come in question. *ibid.*

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- 28 But a *certiorari* lies upon an order of justices concerning a *private bridge*.
Page 450 (N) 2
- 29 And the act of Queen Ann extends only to bridges which the county is bound to repair. *ibid.*
- 30 The 12 Geo. 2. c. 29. authorizes the levying of the county rate, and orders that the repairs of bridges shall be paid therefrom. *f. 21*
- 31 But no part of the money shall be applied to the repair of bridges, until presentment by the grand jury at the assizes or sessions. *ibid.*
- 12 By 7 and 8 Will. 3. c. 7. all securities to procure a seat in parliament is void; and the giving of such a bribe incurs a penalty of 300l. *Page 314 f. 8*
- 13 But if the election is void, no action lies for this penalty. *f. 8 (N) 1*
- 14 By 2 Geo. 2. c. 24. Candidates or voters, giving or receiving a bribe for a vote at elections forfeit 500l. &c. *f. 9*
- 15 But if the offender, within twelve months, discover another offender so as he be convicted, the discoverer not having himself been previously convicted, he is indemnified, but no prosecution shall be after two years. *ib.*

B R I B E R Y.

- 1 Definition of this offence at common law. *311 c. 67.*
- 2 By 12 Ri h. 2. c. 2. the great officers of state shall be sworn not to assist any of the king's officers for reward. *312*
- 3 By 4 Hen. 4. c. 5. no sheriff shall let his bailivick to farm. *313*
- 4 By 5 and 1 Edw. 6. c. 16. whoever shall procure or suffer by bribery shall be deemed to hold, &c. *313*
- 5 No offence is within this act; but the office of chancellor, register, or commissary of the ecclesiastical court. *ibid.*
- 6 No person once disabled can be again restored by any grant or dispensation. *ibid. f. 5*
- 7 A deputy of an officer is bound to pay half the price, or a fourth part for a deputy. *ibid.*
- 8 The above statute does not extend to the plaintiff. *ibid.*
- 9 An officer, who gives a judge was paid for his services; and a witness all bribery is liable to deprivation, fine and imprisonment. *314*
- 10 The Clerk of Assizes fined 500l. for bribery. *f. 7*
- 11 An attempt to influence another by means of a bribe is highly criminal; and offering money to a private counsellor for an office is punishable by information. *ibid. (N)*
- 15 This statute does not take away the common law process by indictment or information. *ibid. (N) 4*
- 17 But the court will not grant information except on special grounds till after the two years are expired. *ibid.*
- 18 And perhaps they will remit sentence on an indictment upon a recognizance to appear at the end of the two years. *ibid.*
- 19 But after that time they will not suspend the sentence because one of the witnesses is indicted for perjury. *ibid.*
- 20 Nor on affidavits that the offender was a discoverer. *ibid.*
- 21 Nor will they grant new trial because a witness was a party in the offence. *ibid.*
- 22 But they will, in order to ascertain who was the discoverer. *ibid.*
- 23 Having obtained a verdict is not conclusive proof of being a discoverer. *ibid.*
- 24 For a person, who makes an affidavit, on which another obtains a verdict, may be the true discoverer. *ibid.*
- 25 A verdict, only when completed by a judgment is a conviction, and the court will grant leave to complete it, and it will then relate back to the original discovery. *ibid.*
- 26 A colourable note or laying a wager is bribery within the act, although the

A TABLE OF PRINCIPAL MATTERS.

- the receiver voted for the opposite party. Page 314 f. 10
- 27 The bribery precludes the candidate from denying the right of the elector to vote. *ibid.*
- 28 A man may be guilty although he has not *then* declared himself a candidate. *ibid.*
- 29 It is not necessary that the party bribed should be in fact an elector. *ibid.*
- 30 The declaration for the penalty must state the sort of bribe that was given or received, and not alledge generally "that he took a gift or reward". 316 (N)
- 31 This defect not helped by verdict. *ibid.*

B U B B L E S.

- 1 To project any scheme by public subscription, to the prejudice of national trade, &c. similar to the South Sea project, incurs a *præmunire* by 6 Geo. 1. c. 13. 86 (N) 10
- 2 And also punished as a common nuisance. 364

BUILDING.—*Vide Freehold. Dwelling House. Looms.*

B U L L I O N

- 1 Is the ore of gold, but it signifies, in general, either gold or silver in the mass. 70 (N) 1
- 2 The king is intitled to all mines in which it is found. *ibid.*
- 3 Debaasing bullion provided against by ancient statutes. f. 1
- 4 By 6 & 7 Will. 3. c. 17. none shall cast ingots of silver, in imitation of Spanish bars, on pain of 500l. 72 f. 7
- 5 None shall export any molten silver, without being marked at Goldsmiths Hall, and a certificate from one of the wardens, that oath had been made by the owner, and one witness, that the same was lawful silver, &c. *ibid.*
- 6 All silver shipped without such mark and certificate may be seized. 73 f. 8

- 7 No broker, not a goldsmith or refiner, shall buy or sell any molten silver on pain of six months imprisonment. Page 73 f. 9
- 8 All bullion to be entered out in the name of the owner, who shall prove whether it be English or foreign. f. 10
- 9 By 7 & 8 Will. 3. c. 19. no bullion shall be shipped except certificate shall be obtained from the Mayor and Aldermen of London, on oath of the owner and two witnesses, that the same is foreign bullion, &c. *ibid.* f. 11
- 10 The certificate to be *circumstantially* certified to the commissioners of customs, before any *cocket* shall be granted. *ibid.*
- 11 On default the owner shall forfeit the bullion, and double value. The captain of the ship 200l. &c. The cockpit officer 200l. and loss of office. *ibid.*

Vide Coin. Multiplication,

B U I L S.

- 1 By 13 Eliz. c. 2. whoever shall put in use any Popish bull or instrument of absolution, shall be guilty of high treason. 67 f. 75
- 2 Accessories after shall be guilty of *præmunire*. *ibid.*
- 3 Whoever does not disclose the offer of such *bulls*, within six weeks, are guilty of misprision of treason. *ibid.*
- 4 By a variety of statutes, the making use of Papal bull is a *præmunire*. 78 f. 12, 14
- 5 It is in the election of the crown to proceed against the offender, either for the *præmunire* or high treason. f. 13

BULLOCK.—*Vide Cattle.*

- 1 By 14 Geo. c. 6. and 15 Geo. 2. c. 34. whoever shall steal, &c. or kill, with intent to steal, any bullock, &c. &c. shall suffer death without clergy. —(N. B. A reward of 101.) 180 f. 3

BURGLARY.

A TABLE OF PRINCIPAL MATTERS.

BURGLARY.

- 1 Is a felony at common law, in breaking and entering the *manſion houſe* of another in the night *with intent* to commit felony. *Page 150. c. 38*
- 2 The word *noctanter*, which is abſolutely neceſſary in every indictment for burglary, is ſatisfied by the degree of darkneſs which may prevent the offender's face from being known. *160. l. 2*
- 3 There muſt be both an actual breaking, and an entry to complete this offence; for it muſt be laid *ſregit et intravit*, which will not be ſatisfied, except in ſome ſpecial caſes, by the notional breaking implied by law in every treſpaſs. *f. 3*
- 4 Therefore, if a houſe be aſſaulted, and the owner ſling out his money, it is no burglary. *ibid.*
- 5 What breaking is ſufficient. *f. 4*
- 6 It muſt be more than that which is ſuppoſed in a common treſpaſs. *ibid.*
- 7 An entrance by an open door, or through a hole, or open window, is not a burglary. *ibid.*
- 8 But if the thief had opened the door, or the window, or made the hole, or had been in the houſe by the owner's conſent and had unlatched a door ſhutter, or had gone down a chimney, it is burglary. *ibid.*
- 9 Or if he had ſubſequent the houſe, with intent to rob, and the owner had opened the door, and, thereupon, he had entered, it is burglary. *161*
- 10 So, where divers intending to rob a houſe, knock at the door and by that means obtain entrance. *f. 5*
- 11 So alſo, with the ſame intent, to take lodgings and then to fall upon the landlord. *ibid.*
- 12 Or under pretence of ſearching for felons to obtain entrance by authority of a conſtable. *ibid.*
- 13 By 12 Ann. c. 7. to enter a houſe by night or day with a felonious intent without breaking it and to *break out of it in the night*, is burglary. *ib. f. 6*
- 14 What entry is ſufficient. *f. 7*
- 15 The leaſt entry with any part of the body, as a foot over the threshold, or with an inſtrument, weapon, or a hand, or hook, or a piſtol with in a window, or to turn the key of a door, or to lift up a latch, are ſufficient entrances to ſatisfy the word *intravit*. *Page 161, 162*
- 16 But the thing with which the entry is made, muſt be introduced for the purpoſe of committing the felony; and therefore where a center bit was uſed for breaking through a door which it had actually perforated, yet as it did not appear that any hand or inſtrument had entered for the purpoſe of committing the felony it was held inſufficient. *162 (N) 1*
- 17 Thoſe who watch on the outside while others enter, are equally guilty though they never enter at all. *ibid. l. 8.*
- 18 So if a ſervant who is in the houſe open the door *ſolemnly*, for the thief to enter, both of them are guilty of burglary. *f. 9 and (N)*
- 19 In what place burglary may be committed. *f. 10*
- 20 Burglary may be committed by breaking, &c. houſes, churches, or the gates of a walled town; and in houſes, the word *manſionalis* is indifpenſibly neceſſary. *ibid.*
- 21 A houſe wherein a man only dwells for part of the year; or which he has actually hired, but not moved into; or a chamber in an inn of court, or a houſe hired by a man's wife for her ſeparate reſidence without his knowledge, for it is the huſband's houſe; are all of them ſufficient to ſatisfy the words *domus manſionalis*. *163*
- 22 And all out-buildings adjoining to the houſe or within the curtilage, are included. *Vide Gaſſard's Caſe. f. 12*
- 23 The indictment muſt lay it to be the houſe of the leſſee or firſt tenant, and not of any of the inmates, except they have the intire poſſeſſion. *f. 13*
- 24 But a chamber in an inn of court is the houſe of the inmate, becauſe there, Chambers are all as ſeveral houſes, &c. *ibid.*
- 25 The author contends for a different doctrine, and that it may be laid as the houſe

A TABLE OF PRINCIPAL MATTERS.

- house of the lodger, *sed quere*, if the owner dwell therein. Page 163, f. 64
- 26 If the lodging be actually divided from the rest of the house, and have a separate door, it is certainly the house of the lodger. f. 15
- 27 Even though there are other inmates, or though the landlord occupy a cellar under the same roof, if he does not sleep in the house. *ibid.* (N) 4
- 28 But if a place be taken only as a work-shop, and no one sleeps therein, it is not a mansion. f. 16
- 29 Therefore to break into the plate glass manufactories, is transportation by 13 Geo. 3. c. 38. *ibid.*
- 30 No burglary can be committed by breaking ground inclosed, or a booth or tent. f. 17
- 31 The indictment must state, and the verdict find *an intention* to commit felony. f. 18
- 32 For if the intent was trespass only, it is no burglary. *ibid.*
- 33 But where the felony intended, is made so by statute, that is sufficient. *ibid.*
- 34 By 10 Geo. 3. c. 48 to receive jewels, &c. obtained by burglary, is transportation, &c. 165 f. 19 235 f. 9
- 35 By 23 Geo. 3. c. 88. to be found with implements for house-breaking is a misdemeanor. f. 20
- 36 A man's house is considered as his castle; he may kill an assailant with impunity. (N)
- 37 The manner in which burglary partakes of the nature of treason. *ibid.*
- 38 Clergy is taken away in burglary from principals by 18 Eliz. c. 7. and from accessories before the fact, by 3 & 4 Will. & M. c. 9.
- 39 Whoever shall apprehend a burglar is exempted by 10 & 11 Will. 3. c. 23. from parish and ward offices, and the 5 Ann. c. 31. has superadded a reward of forty pound:—and an accomplice who shall convict two offenders is intitled to a pardon. *ibid.*

B U R I A L.

1. By 3 Jac. 1. c. 5. if any Popish recusant, shall be buried otherwise than according to the laws of this realm,

his representatives, or the person causing such burial shall forfeit 20*l.*

BURNING.—*Vide Arson.* Page 66.

- 1 To burn the house of which another is in possession is arson. 165 c. 39
- 2 By 43 Eliz. c. 13. any corn or grain in the four Northern counties is felony without. 223 f. 2
- 3 By 22 and 23 Car. 2. c. 7. any corn, grain or hay, &c. transportation. 224
- 4 By 37 Hen. 8. c. 6. any wain or cart loaded with coals, &c. 223
- 5 By 4 and 5 W. and M. c. 23. any covert for the red and black game, whipping and hard labour. f. 2
- 6 By 28 Geo. 2. c. 19. any covert for deer and game, &c. shall forfeit from 40*l.* to 5*l.* *ibid.*
- 7 By 1 Geo. 1. c. 48. any wood, under-wood, or coppice, &c. is felony. 224, f. 3
- 8 By 9 Geo. 1. c. 22. any house, barn, or out-house, &c. is felony without clergy. f. 4
- 9 By 10 Geo. 2. c. 32. any coal mine is death without clergy. f. 5
- 10 By 9 Geo. 3. c. 29. any wind, water, or other mill, is felony without clergy. f. 6
- 11 By 6 Geo. 1. c. 23. assaulting with intention to burn the garments of another, in the public street is transportation. 238
- 12 By 22 & 23 Car. 2. c. 11. & 1 Ann. c. 9. to burn any ship to the prejudice of the owners, or freighters. 4 Geo. 1. c. 12. to the prejudice of the underwriters, felony without clergy. 185 f. 10, 11
- 13 By 12 Geo. 3. c. 24. to burn the king's ships of war, or any of the arsenals, or the stores, &c. therein, felony without clergy. 75 f. 19
- 14 By 6 Ann. c. 31. servants burning, by negligence, any dwelling-house, &c. forfeit 100*l.* 197 c. 53
- 15 By 27 Geo. 2. c. 15. threatening by anonymous or fictitious letters, to burn houses, barns, &c. is felony without clergy. 226 f. 4

A TABLE OF PRINCIPAL MATTERS.

BUSINES.—*Vide H. Law, &c.*

- 1 By 13 Ed. 1. no bush, &c. whereby a man may lack to do hurt, shall do within 200 feet of either side of a highway leading from town to town. But this shall not extend to other or great trees. *Page 33 f. 26*
- 2 And if any be done by not removing such bushes, the lord shall answer. *ibid.*
- 3 By 13 Geo. 3. c. 73. no bush, &c. shall grow within 15 feet from the center of any highway, except for shelter, ornament, or profit. *47 f. 59*

BUTCHER.

- 1 Shall sell meat by the pound. *42 (N)*
- 2 Or by weight, or *ibid.*
- 3 Butcher shall not compel not to do their work but at a certain rate, or not to finish what they have begun. *42 f.*
- 4 Cannot sell meat on a Sunday. *11 (N)*
- 5 But this is no offence at common law, and therefore the indictment must conclude *contra formam juris*, viz. *3 Car. 1. c. 1. ibid.*
- 6 The usual method is to indict for the offence. *ibid.*

BUTTER and CHEESE.

- 1 Every kilnkin of butter shall contain 112 lb. every mikin 56 lb. and every p. 14 lb. reckoning 16 ounces to the lb. *51 f.*
- 2 No old and new butter shall be mixed, nor any butter packed with cream, butter, &c. &c. *ibid.*
- 3 No butter for sale shall be repacked. *f. 86*
- 4 The manner in which the package shall be marked, &c. *ibid.*
- 5 How the factor or buyer shall make the packages. *f. 87*
- 6 Warehouse keepers shall ship all butter and cheese that shall be directed to them to the London market, without licence. *51 f.*

BUTLER.

- 1 A butler, &c. who has the *care*, *bar*, or the *possession* of his master's goods, may be guilty of felony in taking them away. *Page 136 f. 6*

BUYING and RECEIVING.—*Vide stolen goods.*

BUYING TITLES.—*Vide pretended Titles.*

C.

CABBAGES.

- 1 By 13 Geo. 3. c. 32. to steal or destroy cabbages, &c. in a garden, incurs a penalty of 15*l.* *217 f. 11*

CALFNDAR.

- 1 By 3 Hen. 7. Criers must certify their prisoners to the gaol within 10 days to be calendared. *121 f. (7)*

CALICO.—*Vide Cotton.*

CANONICAL OBEDIENCE.—*Canonical Purgation.*

- 1 By 2 Hen. 4. c. 1. to purchase from the Pope an exemption from canonical obedience, incurs *p. excommunication*. *79*
- 2 Canonical obedience results to the metropolitan, both from induction and ordination. *133 f. 7*

CANUTUS.—*Vide Englishshire.*

CAPACITY of GUILT.—*Vide Crimes. Age. Infancy.*

CAPIAS.

A TABLE OF PRINCIPAL MATTERS.

C A P I A S.

- 1 By 14 Geo. 3. c. 86. a *capias* may issue against any person prosecuted for smuggling. Page 227

CAPTIATUR.—*Vide Writ. Procefs.*

CAPITAL OFFENCES.—*Vide Felonies without Clergy.*

C A P T A I N.

- 1 If any captain, &c. shall wilfully cast away, burn or otherwise destroy his ship, to the prejudice of the owners, the freighters, or the underwriters, he shall suffer death without clergy. 175. f. 10, 11
- 2 A captain or other officer in the East India company's service cannot resign his commission at all times and under any circumstance. *Ibid.* (N)
- 3 By 29 Geo. 2. c. 17. English captains or other officers, entering into the service of the French king, are guilty of felony without clergy. *Ibid.*
- 4 The punishment of captains who shall carry bullion unlawfully. 73. f. 11
- 5 Burning his ship to defraud the underwriters is not piracy. 155. (N)
- 6 What acts of a captain amount to piracy. f. 14
- 7 The penalty on the captain for the unlawful transportation of wool. 195

C A P T I O N.

- 1 The caption of an indictment on the statutes of forcible entry need not shew that the justices had authority to hear and determine felonies and trespasses. 283. f. 36

C A R D S.—*Vide Diet.*

- 1 The king's grant for the sole making, importing and selling, of playing cards is void. 471. f. 5

- 2 The playing with them is, in itself, lawful and innocent. Page 471

CARRIAGES.—*Vide Postcovert. Ac. Highways. Turnpike Roads.*

C A R R I E R S.

- 1 A carrier who receives goods to carry to a certain place, cannot be said to steal them by embezzling them afterwards. 134. f. 3
- 2 But if a carrier open a package and take out part of the goods, with intention to steal, he is guilty of felony; for he had no possession of such part distinct from the whole. 135. f. 5
- 3 No carrier shall travel on a Sunday. 11, 12

C A R N A L.

- 1 All unnatural carnal copulations with man or beast come under the notion of sodomy. 9. c. 4
- 2 The carnal knowledge of a woman, by force, and against her will constitutes a rape. 169. c. 41
- 3 By 18 Eliz. c. 7. f. 4. if any person shall carnally know and abuse any woman child under the age of ten years, he shall suffer as a felon without clergy. 170
- 4 By the same statute rape is also excluded. *Ibid.*

CARNALITER COGNOVIT.

- 1 Are necessary in every indictment of rape. 9. f. 2

C A R R O T S.

- 1 By 13 Geo. 3. c. 32. to steal or destroy any carrots, &c. in a garden or land inclosed, on conviction in 30 days in a summary way forfeits 10s. 217. f. 11.

CASTRATION.

A TABLE OF PRINCIPAL MATTERS.

CASTRATION.—*Vide Maim.*

- 1 Was anciently punished with death,
Page 175. f. 3

CASUALTY.

- 1 If casual death happens from the prosecution of a *lawful* act, the party is
guiltless. 5 (N)

CASUAL DEATH.—*Vide Deodand.*

- 1 Whatever thing *moves* toward' the casual death of any person is forfeited as a deodand. 100. c. 26

CASTIGATORY.—*Vide Scold. Cucking Stool.*

CATTLE.—*Vide Slaughter House.*

- 1 By 22 & 23 Car. 2. c. 7. to destroy horses, sheep, or other cattle, in the night, is death or transportation, in the option of the offender, and may be tried by a jury before three justices of the peace. 179 c. 46
- 2 By 9 Geo. 1. c. 22. whoever shall kill, maim, or wound, any cattle, shall be guilty of felony without clergy. 180
- 3 A mare or stone colt is within the meaning of the word *cattle*. *ibid.* (N)
- 4 By 27 Eliz. c. 13. the hundred is liable to the amount of 200l. *ibid.* f. 2
- 5 By 14 Geo. 2. c. 6. and 15 Geo. 2. c. 34. whoever shall steal or kill with that intent, one or more sheep, bull, cow, ox, deer, bullock, heifer, calf, or lamb, but no other cattle whatsoever, shall be deprived of the benefit of clergy. *ibid.* f. 3
- 6 The word *heifer* in this act is used in contradistinction to the word *cow*; therefore evidence of the one will not support an indictment for stealing the other. *ibid.* (N) 2
- 7 By 37 Hen. 8. c. 6. whoever shall cut out the tongue of any tame beal,

or of any person, they being alive, shall pay treble damages, and forfeit ten pounds. Page 180 f. 4

- 8 No salesman within the bills of mortality, shall buy or sell cattle on his own account, or on the road coming to market. 515 f. 89
- 9 How such offenders shall be punished. 90
- 10 By 9 Geo. 3. c. 39. the crown may prevent importation of cattle upon suspicion of the contagion. 180
- 11 By 21 Geo. 3. c. 67. the driving of cattle within the bills of mortality is regulated. *ibid.*
- 12 By 26 Geo. 3. 71. slaughtering cattle without licence or notice, &c. is felony. 180

CENSOR.

- 1 It is questioned (1 *Carth.* 478.) whether the censor of the college of physicians is within the meaning of the the test act, 25 Car. 2. c. 2. 17 f. 4

CEPIT.

- 1 What will satisfy the word *Cepit* in an indictment of robbery. 117

CERTIFICATE.

- 1 Of the oath required by 1 Eliz. c. 1. f. 19. made to the King's Bench, is sufficient; in which an ecclesiastic need not be styled *clericus*; and the bringing of it need not be said *per mandatum episcopi*. *Sed quere* If this statute as to the oath is not repealed by 1 Will. and Mary, c. 8. 81. f. 27. 82. f. 33, 34, 35

CERTIORARI.

- 1 A *certiorari* from the King's Bench, is a superseas to restitution in a forcible entry. 292. f. 62
 - 2 By 1 Ann. c. 18. concerning the repair of bridges no *certiorari* shall be allowed. 450
- 3 Nor

A TABLE OF PRINCIPAL MATTERS.

- 3 Nor by 8 Geo. 2. c. 20. for punishing destroyers of turnpikes *P. 193 f. 7*
- 4 Nor by 12 Geo. 2. c. 29. for attesting county rates. *450 f. 25*
- 5 Nor on 19 Geo. 2. c. 21. against cursing and swearing. *12 f. 4*
- 6 Nor on 23 Geo. 2. c. 13. against seducing artificers. *559 f. 4*
- 7 Nor on 25 Geo. 2. c. 36. against bawdy houses. *357 f. 2*
- 8 Nor on 29 Geo. 2. c. 40. against stealing lead, iron, &c. *232 f. 2*
- 9 Nor on 30 Geo. 2. c. 21. for preserving fish in the Thames. *519*
- 10 Nor on 30 Geo. 2. c. 24. for restraining gaming in public houses. *469*
- 11 Nor on 31 Geo. 2. c. 29. for the regulation of bread. *486*
- 12 Nor on 2 Geo. 3. c. 50. for preventing thefts in bumb-boats.
- 13 Nor on 10 Geo. 3. c. 18. against dog stealers. *143*

CHAIN.—*Inde Fecit.*

CHAIRMEN.

- 1 By 9 Ann. c. 21. Hackney chairmen and coachmen are permitted to play within the bills of mortality on a Sunday. *12*

CHALLENGE.

- 1 To challenge another; to carry a challenge, or to provoke a challenge is a very high offence, punishable by fine and imprisonment. *266 f. 3*
- 2 By 9 Ann. c. 14. f. 8. to challenge another on account of money won at play, incurs a forfeiture of goods and two years imprisonment. *ibid.* If death ensues in consequence of a challenge it is murder. *123 f. 24*

CHAMPERTY.—*Vide Maintenance. Embrocary. Buying a pretended Title.*

- 1 Is a species of maintenance. *545. c. 341*

- 2 By 3 Edw. 1. c. 25. no officers of the king shall maintain suits in the king's courts, by covenant for profit. *Page f. 3*
- 3 This means his courts of record only. *546. f. 4*
- 4 The word covenant signifies all kinds of promises and contracts whether by writing or parol. *f. 5*
- 5 This act applies as well to personal as to real actions. *f. 6*
- 6 Rent out of land in evidence is within the act; not otherwise. *f. 7*
- 7 In a writ of *ChamPERTY* damage is not essential or whether the plea be determined or not. *f. 8*
- 8 The maintenance is equal whether of the plaintiff or the defendant. *f. 9*
- 9 But such grants only as are made in consideration of the maintenance are within the act. *f. 10*
- 10 By 3 Edw. 1. c. 49. no judicial officers, &c. shall receive freehold in ChamPERTY, pending a plea. *f. 11*
- 11 This statute only extends to the officers therein named. *f. 12*
- 12 And they shall not purchase pending plea however they may be related to the party, and although they do not maintain him. *547. f. 13*
- 13 By 28 Ed. 1. c. 11. none shall take upon him any feat, or covenant to give up his right to another, &c. *f. 14*
- 14 A conveyance executed, hanging a plea, in consequence of a previous bargain, is not within the act. *f. 15*
- 15 ChamPERTY may be in actions, real, personal, or mixed, or in suits in equity. *f. 16*
- 16 The voluntary gift of a chattel interest pending a plea is within the act. *f. 17*
- 17 A surrender by lessee to lessor is not within it. *f. 18*
- 18 Nor any conveyance of lands by father to son, ancestor to heir apparent. *548. f. 19*
- 19 A gift of part of the land, to a counsellor for his wages after the suit is determined is not within the act, unless in consequence of a previous bargain. *f. 20*
- 20 By 31 Eliz. c. 5. ChamPERTY may be laid in any county. *f. 21*

CHANCE

A TABLE OF PRINCIPAL MATTERS.

CHANCE MEDLEY.—*Vide Man-slaughter.*

- 1 Homicide without malice, is *some times* called chance medley which signifies killing on a sudden quarrel, or in the commission of an unlawful act. Page 115. f. 1
- 2 And being without premeditation there can be no accessories before. f. 2
- 3 Where the trespass of a stranger authorized by the duty of a game-keeper will reduce homicide to chance medley. 112. f. 8

CHANCERY.

- 1 It is agreed, contrary to former opinions, that suits in chancery to be relieved against a judgment at law, are not within the statute of 16 Rich. 2. c. 5. &c. 80. f. 17
- 2 The provisions of 21 Jac. 1. c. 3. respecting suits to be relieved against monopolies, extends to the court of chancery, &c. 473. f. 31

CHANCELLOR.

- 1 By 25 Edw. 3. if a man slay the chancellor, being in his place, during his office, it is high treason. 60. 51
- 2 On information to the chancellor, &c. of servants riotously spoiling their deceased master's goods, a proclamation may be issued, and if they do not appear, they shall be attainted of felony. 197

CHAPLAIN.

- 1 A master may accompany his *domestic chaplain* to retain counsel, or to engage counsel, and may stand by him at his trial without being guilty of maintenance, &c. 541. f. 23

CHARMERS.—*Vide Witchcraft.*

- 1 Charmers or forcerers were those who by certain incantations pretended to produce supernatural events. Page 8
- 2 This offence was punishable as witchcraft, and by the writ *de heretico compellendo*, on relapse after sentence. f. 2
- 3 One taken with the head of a dead man, &c. brought into the king's bench and sworn, that he would no longer be a forcerer. f. 3
- 4 The degrees of forcery described and punished by 1 Jac. 1. c. 12. repealed by 9 Geo. 2. c. 5. &c. 8, 9

CHACE.—*Vide Hunters, Fences.*

- 1 By 6 Geo. 3. c. 48. and 13 Geo. 3. c. 33. whoever shall destroy the kind of trees therein named in any of his majesty's chaces shall be fined, &c. for the two first offences and transported for the third. 216
- 2 By 9 Geo. 3. c. 41. the above act extends to underwood, &c. and to all the king's chace within the realm. 207
- 3 The punishment of such as shall destroy the banks, ditches, or fences of chaces. 192
- 4 The punishment for unlawfully hunting fallow deer in any chace, &c. 189

CHASTITY.—*Vide Homicide.*

- 1 A woman may justify murder in defence of it. 108 (N) 1
- 2 So a husband is justified in protecting the chastity of his wife. ibid.
- 3 It is the pride of nature, and most lovely characteristic of the sex. ibid.
- 4 But the bare solicitation of chastity is not an indictable offence. 357. c. 74
- 5 Nor is the actual violation of a daughter's chastity considered as an injury, unless

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unless in the character of a servant,
her service is thereby lost. *Page*

CHEATS.

- 1 Cheating consists in defrauding or endeavouring to defraud another of his known right, by means of some artful device, contrary to the plain rules of honesty. 343. c. 71
- 2 But an imposition effected by means of a *bare naked lie*, without the intervention of any artful contrivance, is not cheating, punishable criminally. 344 f. 2
- 3 Common cheating is punishable with fine and imprisonment. f. 3
- 4 By 33 Hen. 8. c. 1. whoever shall falsely and deceitfully obtain the goods, &c. of another, by colour and means of any *false privy token* shall be corporally punishable in any degree under death, as pillory, &c. f. 4
- 5 The offence may be tried at sessions; and the justices may convene suspected offenders. f. 5
- 6 An instance of an offender being fined under the act; *see vide Coke's opinion* (3 Inst. 123) that it cannot be done. f. 6
- 7 Cases, &c. determined upon this act. 345 (N) 2
- 8 By 30 Geo. 2. c. 24. whoever shall by *false pretences* obtain the property of another, *with intent* to cheat and defraud any person, he shall be publicly whipped, or fined and imprisoned, or transported, as the court shall think fit. 345 f. 7
- N. B. No *certiorari* lies on this statute (N)
- 9 By 16 Car. 2. whoever shall *win* any sum or valuable thing, by any fraud or ill practice, shall forfeit treble value, &c. &c. f. 8
- 10 By 9 Ann. c. 14. the offender shall forfeit five times the value, be deemed infamous, and suffer corporal punishment, as in cases of perjury. f. 9
- 11 But the judgment can only be *quod convictus est*, and the fine must be recovered by action, *ibid.* (N)

Vol. I.

CHEESE.—*Vide Butter.*

CHEQUER ROLL.

- 1 By 3 Hen. 7. c. 14. If any of the chequer roll of the king's household under the state of a lord, make confederacy to destroy or murder the king, or any of the sworn council, he shall be guilty of treason. Page 74. f. 13

CHILD.—*Vide Bastard. Marriages. Servants.*

- 1 A child under the age of seven years cannot be punished for any criminal offence. (N) 1
- 2 But he may be compelled, in a civil action, to make *compensation*.
- 3 How far a thing shall be forfeited as a *deodand* for the death of a child. 100
- 4 By 4 and 5 P. & M. c. 8. to *affure* or take away a woman child, is two years imprisonment, &c. 172

CHOSE in ACTION.

- 1 Is not within 21 Hen. 8. c. 7. for punishing servants who steal the goods delivered to them by their masters. 139. f. 14
- 2 By 15 Geo. 2. c. 13. if any of the servants of the bank shall embezzle certain choses in action, with which they are intrusted, they shall be guilty, without clergy. f. 17
- 3 By 5 Geo. 3. c. 25. the same is inflicted on servants of the post office. 140
- 4 By the common law, a *chose in action* cannot be the subject of larceny. 142
- 5 But by 2 Geo. 2. c. 25. whoever shall steal certain securities therein named, notwithstanding they are termed in law, choses in action, shall be guilty of felony of the same nature and degree, as they would be for taking

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taking the money thereby secured.
Page 142 f. 22

CHRISTIANITY. — *Vide Chur. h. & Religion. Heres. Poper. Trin.*

- 1 The punishment of those who shall deny the truth of the christian religion, &c. *f. 11*
- 2 Christianity is part of the common law of England. *id.*
- 3 Publishing a book, to prove the king's government to be tyrannical, &c. may be punished as an overt act of compassing his death. *56. f. 31*

CHRISTMAS DAY.

- 1 By 13 Geo. 3. c. 20. to kill game, &c. on Christmas day incurs fine, &c. *12*

CHURCH. — *Vide Poper.*

- 1 The punishment of absenting from it. *19. c. 10*
- 2 By 1 Eliz. c. 2. all persons, having no reasonable excuse, shall resort to their parish church, or some other place of worship upon every Sunday, and there behave decently during divine service, upon pain of twelve pence for every offence. *f. 1*
- 3 By 3 Jac. 1. c. 4. this forfeiture may be levied by the church wardens by distress or warrant of a justice. (N)
- 4 It is incumbent on the defendant to show the reasonable excuse, and needs not be regularly alleged in the indictment. *20*
- 5 If the spiritual courts refuse a reasonable excuse, or derogate from the common law, they may be prohibited. *f. 7*
- 6 Whoever misbehaves, or quits church during service, is as much within the penalty as if he had been wholly absent. *f. 4*
- 7 Whoever is absent from his parish church shall be put to prove where he was. *ibid.*
- 8 The absence of absence need not be averred in any certain place, for being

a non-seafance, it is not committed any where. *Page 20 f. 5*

- 9 By 23 Eliz. c. 1. all persons above 16 years of age who shall offend against the tenor of the 1 Eliz. c. 2. shall, being lawfully convicted, forfeit 20*l.* for every month they shall to absent themselves from church. *f. 6*
- 10 This penalty of 20*l.* a month does not dispense with that of 12*d.* for every Sunday. *f. 7*
- 11 The words, "lawfully convicted" would have been implied by law. *f. 8*
- 12 No forfeiture accrues unless judgment follow conviction. *ibid.*
- 13 A condemnation on *demurrer*, or *nil dicit*, is sufficient. *21*
- 14 A recusant shall not be excused from these penalties on account of sickness. *f. 10*
- 15 The month intended by the statute shall be computed by the number of days, allowing 28 to each month. *f. 11*
- 16 A *summevent* is within these statute. (N)
- 17 By 29 Eliz. c. 6. and 3 Jac. 1. c. 4. every offender convicted on the above statute, shall pay 20*l.* for every month, after such conviction until he conform and come to church. *f. 12*
- 18 If the offender neglect to pay the forfeiture in the conviction, and the penalties of these statutes, the King may seize his person, and two thirds of his hereditament, leases and farms, notwithstanding any prior conveyance. *f. 13*
- 19 By 3 Jac. 1. c. 4. the king may revoke the 20*l.* a month, and seize the hereditament, &c. leaving the mansion house at the rate of the third part. *f. 13*
- 20 But this election waives the benefit of the 20*l.* a month, and the seizure of the goods. *f. 14*
- 21 A bond may be taken as the goods of the offender. *22. f. 15*
- 22 But no copyhold lands are liable to be seized. *f. 16*
- 23 By 3 Jac. 1. c. 4. the profits of the lands shall go to satisfy the 20*l.* *f. 17*
- 24 *Quere* if the king may seize an estate conveyed *bona fide* by another in trust for

A TABLE OF PRINCIPAL MATTERS.

for a recusant. He may seize an estate granted to a recusant in trust to another. *Page 21 f. 18*

25 How the penalties shall be recovered. *ibid.*

26 By 3 Jac. 1. c. 4. One justice, on confession, or oath of one witness may issue a warrant to the church warden where the offender dwells, to levy the twelve pence on the offender's goods, by distress, for the use of the poor. *23. f. 19*

27 The recovery of the 20*l.* contained in the conviction may be recovered at the suit of the king by indictment in the king's bench, assizes, or sessions. *23. 24*

28 And if the offender do not appear upon proclamation, he shall stand convicted. *f. 22*

29 But such a conviction is no judgment, and therefore cannot be reversed by writ of error, but must be moved into the exchequer and quashed, nor shall such a forfeiture be within the exception of a general pardon. *f. 23*

30 If the proclamation do not pursue the statute, the conviction will be insufficient. *f. 24*

31 An appearance, unless entered of record, is not sufficient. *f. 25*

32 *Quia* if default to a proclamation will amount to a conviction in the king's bench. *f. 26*

33 On appearance of the defendant, the proceedings ought to be according to the common law. *f. 27*

34 By 3 Jac. 1. no such indictment shall be avoided for defect, other than by direct traverse to the point of not coming to church, *unless the defendant conforms.* *25*

35 But the party may plead any collateral matter as a pardon, or *autrefois acquit*, &c. *f. 28*

36 He may reverse a judgment after verdict for a defect to the king's prejudice. *f. 29*

37 By 35 Eliz. c. 1. the said forfeitures may be recovered by action of debt, &c. at Westminster. *f. 30*

38 This statute was made to proceed against the husband for the recusancy of the wife, which could not be done

by the indictment given by the former statute. *Pa. c. 24, f. 31*

39 On an indictment the husband could not be charged for the forfeiture of his wife. *ibid.*

40 But his lands, &c. in her right, may be seized on her conviction. *ibid.*

41 How informers may proceed. *f. 32*

42 By 23 Eliz. c. 1. forfeitures are distributed $\frac{1}{2}$ to the queen, $\frac{1}{4}$ to the poor, $\frac{1}{4}$ to the informer, by action of debt, &c. *26*

43 Offenders refusing to pay within three months after judgment, shall be committed until they pay or conform. *ibid.*

44 This clause extends to the 20*l.* a month. *f. 33*

45 An informer may sue for his own third part or for the whole penalty. *f. 34*

46 An informer may sue for the forfeitures against one not proceeded against by the king. *f. 35*

47 The 29 Eliz. c. 5. extends only to indictments, but does not take away the jurisdiction of the common pleas or exchequer, as to information. *f. 36, 37*

48 A conviction at the king's suit may be pleaded to a suit by an informer. *27. f. 38*

49 It is doubtful whether the conviction of a feme covert can be pleaded to an information against her and her husband. *f. 39*

50 The right of seizure, given to the king by 29 Eliz. c. 5. does not extend to a conviction by action or information. *f. 40*

51 How the 20*l.* a month after conviction shall be recovered. *f. 41*

52 By 29 Eliz. c. 5. & 3 Jac. 1. the offender, once convicted, shall pay 20*l.* a month without any other indictment or conviction, into the exchequer every Easter and Michaelmas term, or the king may seize, &c. *f. 41*

53 But this clause extends to no convictions without judgment be given thereon. *28*

54 How it extends to conviction for default of appearance on proclamation. *ibid.*

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- 55 In what manner prosecutions shall be against the offender's land and goods. *Pa. c. 27. f. 43, 44*
- 56 No seizure can be made till inquisition found. *f. 45*
- 57 The king cannot, without inquisition, grant over the offender's goods. *29. f. 46*
- 58 By 3 Jac. 1. c. 5. no recusant convict shall be disabled from following *any profession, or being executors, administrators, or guardians, on pain of 100 l.* *f. 47, 48*
- 59 By 23 Eliz. c. 1. every person forbearing church twelve months shall on certificate thereof to the king's bench, be bound to good behaviour in 200 l. at least. *f. 49*
- 60 How the forfeiture may be discharged. *f. 50*
- 61 By 23 Eliz. c. 1. offenders conforming in the manner the act directs shall be discharged of all forfeitures. *f. 50*
- 62 By 29 Eliz. c. 6. an offender who conforms, or shall fortune to die, no 20 l. a month or seizure shall be made, while he continues to attend divine service. *30*
- 63 And by 1 Jac. 1. c. 4. a recusant conforming according to the above statutes shall be discharged of all penalties which he might sustain by reason of his recusancy. *f. 52*
- 64 This conformity may be pleaded against an informer as well as the king, by *audita querela* after judgment against an informer, and before execution against the king. *f. 53*
- 65 But the profits which have been seized shall not be restored. *f. 54*
- 66 The inheritance of the protestant heir shall not be liable to the recusancy of his ancestor, unless the two parts of the lands were seized during the life of the ancestor. *f. 55*
- 67 But a recusant heir must conform to free his fee simple lands from the conviction of his ancestor, whether the lands were seized or not. *f. 56*
- 68 How lands in fee tail may be seized by force of a judgment or proclamation. *ibid.*
- 69 By 3 Jac. 1. c. 4. whoever shall retain in his service any inmate who shall not go to some church or chapel where the common prayer is used, &c. for one month, shall forfeit 10 l. a month. *Page 31. c. 11*

CHURCH WARDENS.

- 1 By 3 Car. 1. c. 3. the penalties for keeping alehouses without licence to be levied by the church wardens to the use of the poor. *460*
- 2 By 24 Jac. 1. c. 7. the churchwardens oath enlarged to present offences contrary to 1 Jac. 1. c. 9. for restraining tippling. *467*
- 3 By 11 Geo. 2. c. 26. church wardens, &c. required to carry hawkers of brandy, &c. before justices.
- 4 They may levy the forfeiture of 12 s. for not coming to church. *19*
- 5 They are excepted out of the test act of 25 Car. 2. c. 2. f. 17. *17. f. 4*
- 6 They may whip boys for playing in the church, or pull off the hats of those who refuse to take them off, or may gently turn out disturbers of divine service, without incurring the penalties of 5 & 6 Edw. 6. c. 4. *272. f. 29*

CISTEAUX:

- 1 By 2 Hen. 4. c. 4. to put in execution bulls purchased by those of the order of Cîteaux to be discharged tithes, is præmunire. *79*

CLANDESTINE.—*Vide Marriage. Smuggling.*

CLERGY.—*Vide Felonies.*

CLERGYMEN.

- 1 By 1 Eliz. c. 2. clergymen refusing to use the common prayer, or speaking in derogation of it, forfeit a year's

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year's profit, and suffer six months imprisonment for the first offence, and deprivation for the second. *Pages*

14. f. 2

2 How they may be described in a certificate on 5 Eliz. c. 1. for refusing the oaths. 82 f. 33

3 Are within the statute of highways. 377 f. 15

4 Are sufficiently shewn in an indictment, to be in holy orders by the word, *clericus*. 14 f. 3

CLIPPING.—*Vide Coin.*

1 Clippers of the coin are not within the statute of treasons. 62 f. 55

2 By 5 Eliz. c. 11. clipping, &c. any of the monies of this realm, or foreign money, suffered to be current by proclamation is made high treason. 63 f. 61

3 By 18 Eliz. c. 1. whoever, for lucre, shall diminish, lighten, &c. &c. any of the monies as aforesaid, shall be guilty of high treason, lose goods, &c. &c. and lands during life, but no corruption of blood. *ibid.*

4 Aiders, consenters, and abettors, are equally guilty. *ibid.*

CLOATHS.

1 Maliciously to destroy the garments of another in the public street is transgression. 238

COALS.

1 The coal bushel shall be round, and 19½ inches in diameter, and contain one Winchester bushel and one quart of water. 524

2 All sea coal brought into the Thames, shall be sold by the chaldron of 36 bushels; and coals sold by weight shall in proportion be 11 lb. *avoir-dupois* to every cwt. f. 130

3 Any three justices may set the price of sea coal, and if any person shall re-

fuse to sell, they may enter the place and sell the same. *Page* 524, f. 131

COAT ARMOUR.—*Vide Affrays.*

COERCION. *Vide Coverture, Treason.*

COIN.—*Vide High Treason.*

1 By 25 Ed. 3. c. 2. to counterfeit the king's money is high treason 61 f. 54

2 Those who coin the king's money, without authority, are guilty within this clause, whether they utter it or not. 62 f. 55

3 So also are the authorised *mintors*, if they coin it of baser alloy than the standard. *ibid.*

4 Receivers and comforters also are equally guilty, but clippers are not within this act. *ibid.*

5 But to complete the crime, the counterfeiting must be such as to render the coin passible. (N) 13

6 And uttering false money is neither treason nor misprision thereof within this act. f. 56

7 And only gold and silver coined within the realm, by the king's authority, is "the king's money." f. 57

8 But by 1 Mar. c. 6. to counterfeit the gold or silver coin, *not of the realm*, made current by consent of the crown, or to aid or abet therein, is high treason. f. 59

9 And by 14 Eliz. c. 3. to counterfeit gold or silver coin, *not of the realm*, nor permitted to be current, or to aid or abet therein, is misprision of treason. f. 60

10 By 5 Eliz. c. 11. clipping, washing, rounding or filing, for lucre or gain, any of the proper monies of this realm, or of any other realm made current by proclamation, or aiding therein, is declared high treason. 63 f. 61

11 By 18 Eliz. c. 1. to impair, diminish, falsify, scale, or lighten, by any art or means, for lucre or gain, any such monies, or to aid or consent

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- sent thereto, is high treason, with loss of goods absolutely, lands, daring life only, but no corruption or loss of dower. *Page 63. l. 61*
- 12 By 8 & 9 Will. 3. c. 26. whoever, except the minters; shall make, &c. any punchoon, counterpunchoon, matrix, stamp, dye, pattern, or mould, in or upon which shall be made, or which will make, the figure, stamp, resemblance, &c. (225*6*a, No. 17.) of both or either of the sides of any current gold or silver coin, shall be guilty of high treason. *64*
- 13 Whoever shall make or mend, &c. any edger, or edging tool, instrument, or engine, not of common use in any trade, but contrived for marking the edges of money, with such letters or grainings, as those on money coined in the mint, shall be guilty of high treason. *ibid.*
- 14 Whoever shall make or mend, &c. any press for coinage, or any cutting engine, for making blanks, by force of a screw, out of flatted bars of gold or silver, shall be guilty of high treason. *ibid.*
- 15 Whoever shall, &c. (225*6*b), have any such punchoon, counterpunchoon, matrix, stamp, dye, edger, cutting instrument, or other tool or instrument before mentioned, shall be guilty of high treason. *ibid.*
- 16 The words "pattern or mould," &c. (225*6*b, 12) are omitted in the amended act. (225*6*b, 13.) but it has been determined, that they are comprehensive of the word "tool or instrument;" and that they are to be construed in accordance with, without averting the thing to be a tool or instrument within the act. *63 (N) 14*
- 17 It is also determined, that if a stamp of the coin is kept for sale or use, in, or upon any of the instruments enumerated in the act, it is immaterial whether it be laid in the indictment as an instrument on which the resemblance of the coin is made, or an instrument which will make the resemblance (*ibid.* 225*6*b, No. 12.) But it is determined, that the act relating to the statute. *Act 15,*
- 18 Counsellors, procurers, aiders, &c. are within this act, but no corruption of blood or loss of dower shall ensue. *Page 64*
- 19 By 7 Ann. c. 25. prosecutions upon the above statute, for making, &c. the tools or instruments therein prohibited, or for milling the edges of money, shall be commenced within six months. *ibid.*
- 20 By 8 & 9 Will. 3. c. 26. f. 2. to convey or assist in conveying any coining tool out of the mint, is high treason. *ibid.*
- 21 Or to mark the edges of any of the current, diminished, or counterfeit coin of the kingdom, with the usual letters or grainings, or to counsel or assist therein, is high treason. *ibid.*
- 22 Whoever shall colour, gild, or case over, with gold or silver, or with any wash, or material, producing the colour of gold or silver, any of the current coin, or blanks of base metal of a size to be coined into counterfeit milled money; or shall aid or abet therein, are declared guilty of high treason. *ibid.*
- 23 It has been adjudged immaterial whether the colouring be put on, or made to arise out of the subject coloured. *(N) 16*
- 24 Coining tools or instruments found in the custody of any person not a minter may be seized, carried before a justice, produced at the trial, and there destroyed. *65*
- 25 By 15 Geo. 2. c. 28. to wash, gild, or colour, or to add to, or alter the impression of any shilling, or six pence real or counterfeited, with intent to make them resemble, either a guinea or half guinea, is high treason. *f. 64*
- 26 So also to alter, wash, or colour any halfpenny or farthing with intent to make them respectively resemble either a shilling or a sixpence is high treason. *ibid.*
- 27 Counsellors, aiders, abettors, and procurers are within this statute. *ibid.*
- 28 The counterfeit money must be in the likeness and similitude of the lawful money. *(N) 17*
- 29 By 10

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- 29 By 25 Ed. 3. c. 2. to bring false money into the realm, counterfeit according to the similitude of the money of *England*, to merchandize, or make payment with, is high treason. *Page 61. 65*
- 30 By 1 & 2 P. & M. c. 11. to bring into the realm, money, counterfeit to foreign coin current here, is high treason. *ibid.*
- 31 The party bringing must know it to be false. *f. 66*
- 32 It must be from a foreign nation, and not from any place subject to the British crown. *f. 67*
- 33 The bare uttering is not within these statutes. *66*
- 34 By ancient statute a suspected person may be arrested for having false money. *f. 68*
- 35 And *quare*, if the money need to be actually merchandized with, or paid away (*Vide* Nos. 29, 30.) *f. 69*
- 36 The standard of coin is 2 car. copper to 22 car. of gold, 18 den. copper to 11 car. 2 dwts. silver. *70 (N) 1*
- 37 The standard can only be altered by parliament. *f. 71*
- 38 By 9 & 10 W. 3. c. 21. and 13 Geo. 3. c. 71. Gold or silver money diminished, or counterfeit may be cut by the person to whom tendered. But at his peril if it prove otherwise. *71. f. 3*
- 39 By 15 Geo. 2. c. 28. Knowingly to utter any false or counterfeit money incurs, for the first offence, six months imprisonment and surety for six months more. For the second offence 2 years imprisonment and surety for 2 years. The third offence is death. *f. 4*
- 40 To tender in payment any *fiat* money, twice within ten days, or to have one or more pieces thereof in custody, besides what is tendered, is, for the first offence, two years imprisonment and two years surety. The second offence is death without clergy. *ibid.*
- 41 The prosecution must be within six months. *ibid.*
- 42 To coin or counterfeit a $\frac{1}{2}$ or $\frac{1}{4}$ is two years imprisonment. *74*
- 43 But by 11 Geo. 3. c. 40. to commit, or to aid or assist in this offence is felony. *Page 72, f. 5*
- 44 To buy, sell, take, receive, pay, or put off any counterfeit copper money not cut in pieces, at a lower rate or value than it imports to be of, or was counterfeited for, is felony. *ibid.*
- 45 A justice on the oath of one witness may issue a warrant to search for coin-ing instruments, &c. *ibid.*
- 46 By 13 Eliz. c. 2. those who forge foreign coin not current here, their aiders, &c. are guilty of misprision of treason. *87 f. 7*

COLONIES.—*Vide Transportation.*

C O L L A T E R A L.

- 1 A collateral issue may be pleaded and replied to *ore tenet*, and a *verdict* awarded, returnable *instanter*. *3(N) 5*

C O L L U S I O N.

- 1 If any servant, pleader, or other, be guilty of collusion, how he shall be punished. *542 f. 29*

COMBINATIONS.—*Vide Conspiracy.*

COMBUSTIO DOMORUM.—*Vide Arson.*

C O M B A T.

- 1 The victor, in a judicial combat, is justified from the imputation of murder, and the reason of it. *107 f. 10*

C O M M A N D.

- 1 A forcible entry, committed by the command of an infant or feme covert. *K r +* *wid*

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will not involve them in the guilt.

Page 283 l. 35

COMPOS MENTIS.—*Vide Nota Compas.*

COMMISSIONERS.—*Vide Bankrupts.*

COMMON.

1 A common is not within the statutes of forcible entry. 282

COMMON COUNCIL MAN.

1 Is within the corporation act of 13 Car. 2. 15 f. 1

COMMON LAW COURTS.

- 1 Have no cognizance of *mere* heresy; but if the consequences of it become injurious to the public peace, the offender may be indicted. 6 f. 6
- 2 They may incidentally take cognizance of heresy, in judging of offences ordained by statute. f. 7
- 3 On a *quare impetit*, if the cause be heresy, the bishop must specify it particularly, that the temporal court may direct the jury accordingly. f. 7
- 4 But a person accused for heresy in a spiritual court, cannot move for a prohibition. f. 9
- 5 To draw any out of the realm, in plea, which belongs to the common law court, or to sue in other courts to defeat the judgments given there, incurs *præmunire*. 79 f. 14, 15

COMMONS.

- 1 To assert that the house of commons or the house of lords, have legislative authority without the king, is treason. 69

COMMON WEALTH.

- Offences against it are;
- 1 Imbezzling of Records. 177
 - 2 A goaler forcing his prisoners to appear. 194
 - 3 Obstructing lawful process. }
 - 4 Escaping from custody. } Bk. 2.
 - 5 Prison Breach. }
 - 6 Reicous. }
 - 7 Returning from transportation. 244
 - 8 Theft bore. 252. 237
 - 9 Knowingly receiving stolen goods. 232
 - 10 Common Barratry. 524
 - 11 Maintenance. 535
 - 12 Champerty. 545
 - 13 Compounding of informations.
 - 14 Conspiracy. 346
 - 15 Perjury. 318
 - 16 Bribery. 311
 - 17 Embracery. 548
 - 18 Extortion. 310

COMMON PRAYER.

- 1 The first establishment of it. 13, 14
- 2 By 1 Eliz. c. 2. ministers neglecting to use it, or speaking in derogation of it, forfeit one year's profit, and suffer 6 months imprisonment for the first offence, and deprivation for the second. 14 f. 2
- 3 Clergymen without a *cure* are within this act. f. 3
- 4 In an indictment, the word *clericus* is sufficient to shew they are within holy orders. *ibid.*
- 5 His statute does not restrain the spiritual court from proceeding against offenders, as disturbers of the unity and peace of the Church, &c. f. 4
- 6 Also by 1 Eliz. c. 2. to detract the said book in plays, songs, &c. or to procure a minister to alter the form, or to let any other minister say a different form of prayer, is a forfeiture of 100 marks, or six months imprisonment for the first offence, 400 marks, or twelve months imprisonment for the second if not paid in six weeks,

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weeks, and for the third loss of goods and imprisonment for life. *Page* 400

- 7 *Quere* whether the imprisonment shall enue if the offender die without paying the penalty within six weeks. *f.* 6
- 8 To disturb the reading of the common prayer is within the penalties of 1 Mary, *f.* 2. c. 3. 272 *f.* 30

COMPANION.

- 1 By 25 Edw. 3. if a man do violate *the King's Companion*, he is guilty of high treason. 50
- 2 By the king's companion is meant his wife. *ibid.*

COMPUTATION.

- 1 A month shall be computed by the number of days, allowing 28 days to each, according to the common rule where a month is generally spoken of. 21 *f.* 11
- 2 But an assurance for payment of money with interest, shall be computed by calendar months, for otherwise it would be usury. 530 *f.* 13
- 3 How miles shall be computed. 35 *f.* 15
- 4 In murder within a year and a day, the whole day on which the hurt was done, shall be reckoned first. 119 *f.* 9

COMPASS.—*Vide High Treason.*

CONCEALMENT.

- 1 Concealment, or procuring the concealment of felony, whether by common law or by statute, is misprison. 251 *f.* 2
- 2 The concealment of treasure *trove* is misprison. (N) 1
- 3 By 3 Edw. 1. c. 9. sheriff, coroner, or bailiff, &c. who shall conceal, consent, or procure to conceal the felonies done in their liberties, shall be fined and imprisoned at the king's pleasure. *f.* 3

- 4 By 3 Hen. 7. c. 1. justices may summon a jury to enquire of the concealments made by other inquests, &c. *Page* 251 *f.* 4

CONIES.

- 1 In a forest, chase, or warren, not the subject of larceny at common law. 144 *f.* 26
- 2 By 9 Geo. 1. c. 22. to rob any place where conies are kept, being armed, and disguised, is felony without clergy. 187

CONFORMITY.

- 1 The offence in accepting or holding an office without due conformity to the church. 15 c. 4
- 2 Non-conformity in officers consists in not receiving the sacrament and in attending other worship than the church. *ibid.*
- 3 The offence of teaching school without conformity to the church. 18 c. 9
- 4 For non-conformity of papists, &c. *Vide Church. Dissenters.*

CONSERVATORS.—*Vide Constable.*

CONSPIRACY.

- 1 A definition of conspiracy. 346 c. 72
 - 2 Barely to conspire to indict another maliciously, whether any thing be done in prosecution of such intent, or not, is conspiracy. *f.* 2
 - 3 But a bare conspiracy to indict another, will not maintain *the writ of conspiracy*. 347
 - 4 Nor can *the writ* be brought, unless the party indicted be acquitted. *ibid.*
 - 5 But, perhaps, a writ may be formed to meet the case of a person falsely indicted who has not been acquitted. *ibid.*
- 6 And

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- 5 And it is certain that an *action on the case in the nature of such a writ* doth lie for a malicious prosecution, although it doth not proceed to an indictment. *Page 347*
- 7 And an indictment or information may be brought for conspiracies within the statute of Edward the First (vide p. 346) *348*
- 8 In an action for a malicious prosecution, the plaintiff must shew that the original intent is at *malice*. *ibid.* (N) 1
- 9 It is sufficient to maintain an indictment at common law, for a malicious accusation. *48*
- 10 And for this offence a man may be not only sentenced to the pillory but branded. *ibid.*
- 11 At common law, all confederacies wrongfully to prejudice a third person are criminal. *ibid.*
- 12 The offence consists in the conspiracy; and it is criminal to conspire to do a lawful act. *ibid.*
- 13 The fact of conspiring need not be directly proved; it may be collected from collateral circumstances. *ibid.*
- 14 And if the parties concur in doing the act, although unacquainted with each other, it is conspiracy. *ibid.*
- 15 The insufficiency of the indictment; want of jurisdiction in the court; or the improbability of injuring the defendant, is no justification in conspiracy for a malicious prosecution. *f. 3*
- 16 Nor is it a plea that the party only intended to give evidence in the regular and legal course of justice. *349*
- 17 But no juror is liable, to any prosecution, in respect to any verdict given to him, either upon a grand or petit jury. *f. 5*
- 18 Judges of record also, are freed from all prosecution for any thing done by them as judges. *350 f. 6*
- 19 Let it a judge turn solicitor; tamper with witnesses, or labor jurors, he may be punished. *ibid.*
- 20 Conspiracy, upon the statute (Vide p. 346) must be both false and malicious. *Page 350 f. 7*
- 21 Therefore, if the defendants in a writ of conspiracy, can prove a probable cause, they shall be discharged. *ibid.*
- 22 But *quære* if it can be given in evidence on the general issue. *ibid.*
- 23 One person cannot be guilty of conspiracy upon the statute. *f. 8*
- 24 Therefore husband and wife cannot be indicted alone, for they are but one; and the acquittal of all but one, is an acquittal of all. *ibid.*
- 25 But an action on the case in the nature of a writ of conspiracy, may be brought against one only. *ibid.*
- 26 And it brought against several, and all but one be acquitted, yet judgment may be given against him. *ibid.*
- 27 A conspirator convicted at the suit of the party shall pay damages, and have fine and imprisonment. *f. 9*
- 28 When at the suit of the king, *de re curia* judgment was formerly given. *ibid.*
- 29 But this is obsolete; and the punishment is pillory, fine, imprisonment and surety for behaviour. *352*
- 30 Quarter sessions have jurisdiction, in conspiracy. *(N) 3*
- 31 On motion to arrest judgment, the defendant must be personally present. *ibid.*

CONSENT.

- 1 Bigamy, if either of the parties are within the age of consent, *both* of them are protected, by the exception, from the penalties of 1 Jac. 1. c. 11. *174 f. 5*

CONTEMPTS.

- 1 Against the king's palace. *87 c. 21*
- 2 Fighting therein, was anciently, a capital offence. *f. 1*

3 By

A TABLE OF PRINCIPAL MATTERS.

- 3 By 33 Hen. 8. c. 12. striking and drawing blood therein is punished with loss of the hand, perpetual imprisonment, and fine at pleasure. *Page 87 f. 1*
- 4 But *quere* if the king be not resident therein at the time of the offence. 88
- 5 The instance in 3 Inst. 140. for striking in the tower is not warranted by the record. *ibid.*
- 6 And *quere* if a peer can be imprisoned by the king's bench for the non-payment of a fine, *if it be exorbitant*, for this offence. (N) 1
- 7 Against the king's courts. 88 f. 3
- 8 Striking therein, where the king is only constructively, is an offence at common law, and more penal than striking where he is actually present. *ibid.*
- 9 For to draw a sword in the presence of one of the judges therein, whether he strike or not, or to strike a juror or other person, loss of hand, goods, profit of lands, and if laid as *coram domino rege*, it is perpetual imprisonment. *ibid.*
- 10 To which *san assauti defensus*, is no justification. f. 4
- 11 To rescue a prisoner from any of the courts, is loss of goods, profits of lands, and imprisonment for life, and if he strike, loss of hand. f. 5
- 12 An affray near the said courts, is fine and imprisonment. f. 6
- 13 Threatning, or reproachful words to a judge on the bench, is a high mitigation. f. 7
- 14 To reflect on the justice and honour of those *lib* courts, is an indictable offence. 89
- 15 Whoever gives the lie in Westminster-hall, sitting the courts, shall be bound to good behaviour. f. 9
- 16 To make an affray in the presence of the king's inferior courts is fineable, but no loss of hand. f. 10
- 17 To speak reproachfully to the judge of such a court in the execution of his office, is fineable immediately, and *perhaps* indictable. f. 11
- 18 Formerly slandering the justice of the nation was indictable. f. 12
- 19 But now the offender may only be bound to good behaviour, except the offence was committed against *sub* officers in the actual execution of office. *Page 89 f. 13*
- 20 Instances of this kind for which a man shall *not* be indicted. 90
- 21 But the injurious treatment of persons under the protection of the king's courts is a contempt. f. 14
- 22 To suppress the truth during an examination ~~is~~ contempt of court. f. 15
- 23 So also to dissuade a witness from giving evidence against a prisoner. *ibid.*
- 24 Or to advise a prisoner to stand mute. *ibid.*
- 25 If a grand jury discover to a person indicted, the evidence against him, it is high misprision. *ibid.*
- 26 Contempts against the prerogative. 91 c. 22
- 27 Refusing to assist the king for the national good. f. 2
- 28 As for a peer to neglect a summons to parliament. *ibid.*
- 29 Or to depart from thence without licence. *ibid.*
- 30 Or for a privy councillor to refuse his advice. *ibid.*
- 31 Or for a private subject to refuse to defend the kingdom against foreign invasion. *ibid.*
- 32 Preferring the interest of a foreign prince; or to receive a pension from him without leave, is contempt of prerogative. ~~ibid.~~
- 33 To do any what the law enjoins. f. 4
- 34 As refusing obedience to writs, &c. *ibid.*
- 35 Or not answering the privy council in matters of state. *ibid.*
- 36 Or refusing to give evidence to the grand jury. *ibid.*
- 37 Or not returning from beyond sea, upon notice. *ibid.*
- 38 Or going beyond sea against a *ne exeat regnum*. *ibid.*
- 39 So also every contempt of a statute is indictable, if no other punishment be limited. 92 f. 5
- 40 Neglecting to join the *prosequatur* is a contempt. (N) 1

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41 Contempts against the king's person.

Page 96 c. 23

42 Spreading false rumours concerning the king's intentions. f. 4

43 Charging him with a breach of his coronation oath. f. 5

44 Speaking contemptuously of him. 93 f. 6

45 Of contempts against the government. 92 c. 23

46 As charging it with oppression or weak administration. f. 1

47 Or abetting persons at the gallows. 2

48 Or thinking to *let* the pious memory of a traitor, &c. *ibid.*

49 Or endeavouring to frighten the king into a change of measures. f. 3

50 And *perhaps* to refuse the custom in a foreign port. 93 f. 7

51 Contempts against the king's title. 93 c. 24

52 How far the offence of denying his title is a contempt. 93, 94

53 How far refusing to take the oath of allegiance is a contempt of the king's title, at common law. 94, 95

54 How far refusing to take the oaths of allegiance, supremacy, and abjuration, *as directed by statute*, is a contempt, &c. 95 to 99

CONSTABLE.

1 Constables are not within the test act. 17 f. 4

2 Every high and petty constable is a conservator of the peace, by common law, within their several limits. c. 63 f. 14

CONTINGENCY.

1 How far a person who has only a contingent interest may maintain another in a suit on the subject on which the contingency is to operate. 538 f. 14, 15

CONTRA PACEM.

1 The words *contra pacem* are essentially necessary in an indictment for barratry. Page 526, f. 12

CONVENTICLES.

- 1 Established for diffusing heretical tenets can only become the subject of indictment at common law, when they raise factions which may tend to disturb the public peace. 6 f. 6
- 2 By 1 Mary, f. 2. c. 3. certain disturbers of licensed conventicles, are directed to be punished in a summary way. 272 f. 30
- 3 The King's Bench will grant an information for disturbing protestant dissenters conventicles. 49 (N) 2

CONVICTS — *Vide Transportation.*

CONVICTION. — *Vide Hierarchy, Felony by Statute.*

- 1 It is always implied by law, that there must be a conviction before punishment. 20 f. 2
- 2 A conviction is of no effect unless judgment be given thereon. *ibid.*
- 3 For every judgment implies a conviction; but a conviction does not imply a judgment. 21
- 4 A party has no remedy against an insufficient conviction but to move it into the superiour court, and quash it. 24
- 5 What conviction will be sufficient for absents from church. 24
- 6 How far a conviction may be pleaded in bar to a subsequent prosecution. 27
- 7 An additional punishment for a second offence, can never be inflicted, unless there has been a previous conviction for the first offence. 67 f. 74 168 f. 3

CONVOCATION.

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CONVOCATION.

- 1 The convocation may declare what opinions are heretical. *Page 6 f. 3*
- 2 But cannot convict a heretick. *ibid.*

COPY.—*Vide Books. Authors.*

- 1 Copying a libel has been held conclusive evidence of publication; except some subsequent act is done to explain the precedent intention. *355 f. 10*

COPYHOLD.

- 1 Not liable to be seised for recusancy. *22 f. 16*

CORONATION OATH.

- 1 To charge the king with a breach of his coronation oath is a contempt against his person. *96 f. 5*

CORPORATION.

- 1 Must repair their own bridges. *415 f. 3*
- 2 Aggregate, may be bound to repair bridges, either by special tenure, or prescription. *443 f. 2*
- 3 May be compelled to repair highways by force of a general prescription. *369 f. 3*
- 4 May set the price of victuals notwithstanding the 25 Hen. 8. c. 2. *481 f. 8*
- 5 Are punishable for riot in their natural, but not in their public capacity. *298 f. 13*
- 6 How they may be punished for suffering riots. *ibid.*
- 7 The corporation act. *16*

CORN.

- 1 To assault with intent to hinder the exportation of corn, is a misdemeanor punishable by hard labour for three months, &c. &c. *243 app. 12*
- 2 To commit the offence a second time, or to destroy any store-house or gra-

nary in which corn is lodged for the purpose of exportation; or to spoil the grain therein, is transportation for seven years. *Page 243 f. 2*

- 3 The hundred liable to the damage not exceeding 100 *l.* *244 f. 3*
- 4 Punishment for selling corn otherwise than by the Winchester bushel. *486*
- 5 If any magistrate shall permit it to be otherwise sold, he shall forfeit *5 l.* *ibid. f. 2*
- 6 The manner in which corn shall be measured. *f. 3 & 4*
- 7 By 22 and 23 Car. 2. c. 7. to burn stacks or ricks of corn, &c. is felony. *106 f. 2*
- 8 And by 43 Eliz. c. 13. if committed in any of the four Northern counties it is felony without clergy. *ibid.*
- 9 By 9 Geo. 1. c. 22. whoever shall set fire to any stack of corn shall suffer death without clergy. *224*

CORONER — *Vide Decadant, Inquisition.*

- 1 There can be no forfeiture as a *decadant*, nor can any thing be seized as such, till it be found by the coroner's inquest to have caused a man's death. *101 f. 8*
- 2 But after the coroner has made his inquisition, which ought to find the value, the sheriff is answerable for it and may levy for it on the town *where it fell.* *101, 102*
- 3 If the coroner neglect to make an inquest, it cannot be taken by the grand jury. *(N) 37*
- 4 When taken by the coroner it may be moved and traversed. *ibid.*
- 5 The personal estate of a *seign de se* is not vested in the king until the coroner has taken his inquest. *104*
- 6 Such inquisitions ought to be by the coroner, *super visum corporis*, if the body can be found. *ibid. f. 10*
- 7 And it is said *this kind* of inquisition cannot be traversed. *ibid. f. 11*
- 8 The coroner has only authority *super visum corporis*, and if the body cannot be found, the inquisition may be taken

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taken by the King's Bench, or by a justice of the peace. *Page 104 f. 12*
 9 And their inquisition may be traversed.

ibid.

- 10 The manner in which their inquisitions ought to find the fact. *f. 13, 14*
- 11 If they be full in substance, the coroner may be served with a rule to amend defect of form. *f. 15*
- 12 For murder or manslaughter, the party is always arraigned and tried upon the coroner's inquest, as well as upon the indictment.

C O S T S.

- 1 By 5 Eliz. c. 14. the defendant convicted of forgery, shall pay double costs. *339*
- 2 By 21 Jac. 1. c. 3. there shall be double costs against monopolisers. *474*

C O T T O N S.—*Vide Forgery.*

- 1 The punishment for cotton manufacturers assaulting or abusing their masters. *239*
- 2 By 22 Geo. 3. c. 40. whoever shall enter by force any place, with intent to destroy any calico, cottons, &c. in the loom, or shall actually cut the same out, or destroy any of the utensils, &c. shall be guilty of felony without benefit of clergy. *240, 241*
- 3 By 4 Geo. 2. c. 16. and 18 Geo. 2. c. 18. to steal cottons from bleaching or printing grounds, is felony without clergy, but the judge may transport for 14 years. *146 (N), 13*

CORRUPTION OF BLOOD.

- 1 Where a statute saves the corruption of blood, it impliedly saves the descent of the land of the offender to the heir. *109. f. 5*
- 2 It is the immediate consequence of an attainder.
- 3 This consequence is saved by a variety of statutes.

- 4 The blood of a *felo de se* is not corrupted. *Page 103. f. 8*

C O V E N A N T. . .

- 1 The word "covenant" in 3 Edw. 1. against champerty, includes promises either by writing or parol. *546. f. 5*

COVENTRY ACT.—*Vide Maim.*

- 1 By 22 & 23 Car. 2. c. 1. whoever shall, by lying in wait, disable the tongue, put out the eye, slit the nose, cut off the lip, or any limb or member of another *with intent* to maim or disfigure, he, his aider, &c. shall suffer death without clergy. *176*

COUNCIL, and COUNSELLOR.

Vide Barrister.

- 1 By 5 Eliz. c. 14. counsellors shall not be punished for showing a false deed in evidence.
- 2 By 3 Jac. 1. c. 5. no popish recusant shall be a counsellor.
- 3 If a privy councillor refuse the king his advice, it is a contempt of the prerogative. *91. f. 2*

COUNTERFEITER.—*Vide Treason.* *Felony. Forgery.*

C O U N T Y.

- 1 By 33 Hen. 8. c. 23. traitors or principal murderers, by order of the privy council may be tried, by special commission, in *any* county. *119. f. 11*
- 2 By 27 Hen. 8. c. 4. and 28 Hen. 8. c. 15. a murder done at sea, may be tried in any county. *ibid. f. 12*
- 3 By 2 Geo. 2. c. 21. Principals and accessaries to a murder, where the stroke, &c. is at sea, and the death on land, or *a converso*, may be tried in the county where either the death or stroke shall be. *120*

4 By

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- 4 By 2 & 3 Edw. 6. c. 24. a wound in one county, and the death in another, shall be tried in the county where the death shall happen. *Page 121*
- 5 By 26 Hen. 8. c. 6. a murder in Wales may be tried in the next adjoining English county. *ibid.* f. 14
- 6 But appeals must be brought in the proper county. (*See. id.* 2 Geo. 2. c. 21) *ibid.*
- 7 Larceny in one county, and the goods carried into another county, the offender may be indicted in either. 136. f. 9
- 8 But in a robbery at sea, the pirate cannot be indicted in the county to which he carries the goods taken. 137
- 9 By 13 Geo. 3. c. 31. Larceny in Scotland may be tried in any county where the goods are found, &c. and *conversely.* *ibid.*
- 10 Which shall be considered as the next adjoining English county to Wales. 220, 221

COURTS.—*See The Jurisdiction.*

COVERTURE

- 1 The coverture of a woman protects her from punishment for committing bare thefts in company with, or coercion of her husband. 4
- 2 This exemption extends to burglary, and *amounting* to robbery. *ibid.* (N) 8
- 3 It also protects her from being an accessory in felony by receiving her guilty husband. f. 10
- 4 And in treason, from being deemed a principal by such reception. (N) 9
- 5 But coverture will not protect a wife for a theft committed of her own voluntary act, &c. f. 11
- 6 Nor will it protect her from the consequences of treason, murder, or *robbery* (quere) under any circumstance. *ibid.*
- 7 Nor for receiving stolen goods without her husband's privy. (N) 10
- 8 Nor is it any protection to a malicious appeal. f. 13

- 9 And in general, coverture is no protection for any offence *not capital*, against the common law or statute. *Page 4. f. 13*
- 10 A wife cannot commit larceny of the goods of her husband, by reason of the coverture. 141. f. 19
- 11 Coverture no protection in forcible entry. 283. f. 35

CRIMES.—*Vide Piracy.*

- 1 Of felonies committed therein. 157. c. 37

CRIMES.

- 1 What persons may be guilty of them. 1
- 2 Neither infants, idiots or lunatics can be punished for crimes. 2
- 3 Formerly held, that a mad man might be punished for treason. *ibid.*
- 4 Whoever is guilty of a crime through drunkenness shall be punished. 3
- 5 Whoever incites a mad man to commit a crime, is a principal offender. f. 7
- 6 How far a *felony* *certum* is punishable for crimes. 4
- 7 A crime committed by a son or a servant shall not be executed by the command either of parent or master. 8
- 8 How those who charge another with the crime of witchcraft may be punished. 9

CROWN.

- 1 Every king in actual possession of the crown, is a king within 25 Ed. 3 c. 2. 52
- 2 The crown descends to the heir within this act, before his coronation. 53 f. 19
- 3 By 1 W. & M. c. 2. Papists are rendered incapable to possess or enjoy the crown of this realm. f. 21
- 4 Soliciting

A TABLE OF PRINCIPAL MATTERS.

- 4 Soliciting a prince, in amity with the crown, to invade the realm, is treason. Page 56

- 5 By 4 Ann. c. 8. to maintain that the pretended prince of Wales, or any other, hath any title to the crown otherwise than according to 1 W. & M. c. 2. or 11 & 12 W. 3. c. 2. or that the kings of this realm, by authority of parliament, are not able to limit and bind the crown, &c. is high treason. 69 f. 85

C R O W.

- 1 By 23 Geo. 3. c. 88. any person apprehended with a crow, intending to break any house, &c. shall be deemed rogue and vagabond. 165

CUCKING STOOL,

- 1 Sometimes called Ducking Stool, the usual punishment for a common scold. 365

C U R S I N G.

- 1 By 19 Geo. 2. c. 21. for profane cursing and swearing, every labourer, common soldier, or sailor, shall forfeit 1 s. every other person under the degree of a gentleman, 2 s. every person of above that degree, 5 s. 12 f. 4
- 2 On a second conviction the penalties shall be double, and for every other conviction treble the sum first forfeited. *ibid.*
- 3 If not immediately paid or secured, the offender being a labourer or gentleman shall be sent to the house of correction for 10 days, and a common soldier or sailor in employ shall be set in the stocks for two hours, &c. *ibid.*
- 4 A justice may convict on his own hearing, or on confession, or the oath of one witness. *ibid.*
- 5 The constable must inform if he knows the offender, if not, he must apprehend. *ibid.*
- 6 This act to be read in all churches after every quarter day. *ibid.*

C U T L A S S.

- 1 By 23 Geo. 3. c. 88. persons apprehended with a cutlass with intention to assault another shall be deemed rogue and vagabond. Page 148

CUT PURSE.—*Vide Larceny, Privately Stealing.*

CUTTING.—*Vide Maim. Hop Binds. Coventry Act.*

• C Y P H E R I N G.

- 1 By 5 Eliz. c. 1. whoever, by writing, cyphering, &c. shall extoll the Pope's jurisdiction, shall be guilty of a *praemunire*. 67 l. 72

D.

D A M A G E S.

- 1 The double damages given by 5 Eliz. c. 4. for forging a release of an obligation, &c. shall be governed by the penalty. 342 f. 24

D E A D B O D Y.

- 1 To take a dead body from the grave, to be used in witchcraft was within 1 Jac. 1. c. 12. now repealed. 8

D E A D L Y F E U D.

- 1 By 43 Eliz. c. 13. to burn any barn, or stack of corn or hay, or to prey or make spoil of the persons or goods of the subject upon *deadly feud* in the four Northern counties is felony without clergy.

D E A T H.

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DEATH.—*Vide Homicide. Casual Death, Deodand.*

DEBATING.

- 1 By 21 Geo. 3. c. 49. all houses for publicly debating, &c. on any part of the Lord's day to which persons shall be admitted for money, or by charging an unusual price for refreshments, &c. shall be deemed a disorderly house, and the keeper, master, and director thereof, subject to fine and imprisonment. Page 12

DEBTS.

- 1 A Popish heir has no other mode of exonerating the inheritance from the debts due by the recusancy of his ancestor than to conform. 30 f. 56

DEBTORS.

- 1 Insolvent, may be brought to the quarter sessions and obliged to deliver a schedule of their estate and effects, and for perjury therein, or in refusing, for 40 days, to deliver such schedule, guilty of felony without clergy. 20 f. 4

DECEITS.

- 1 Deceitful practices, to defraud another of his known right *by means of artful devices*, contrary to the plain rules of common honesty, are punishable at common law. 313
- 2 Instances of this species of deceit. *ibid.*
- 3 The deceit must be accompanied with *an artful contrivance*, and not wholly depend on a *bare naked lie*. 314
- 4 By 33 Hen. 8. c. 1. deceitfully to obtain the property of another by any privy false token, or fictitious letter, &c. Vol. I.

shall be liable to any *corporal punishment* short of death. Page 344 f. 4

- 5 The offender may be tried before the chancellor, or at the assize, or quarter sessions, &c. *ibid.*
- 6 And there has been an instance of a person fined 500*l.* upon this statute. 345

- 7 Instances of what shall be considered a privy false token. (N^o 2

- 8 By 30 Geo. 2. c. 24. to obtain property *by false pretences*, with intent to cheat another, subjects the offender to pillory, whipping, fine, imprisonment or transportation. f. 7

- 9 By 16 Car. 2. c. 7. deceitfully to defraud another at any of the games mentioned in the act, subjects the offender to forfeiture, &c. of treble value. f. 8

- 10 By 9 Ann. c. 14. to win money by any deceitful practice, subject the offender to five times the value won, renders him infamous, and liable to punishment as in cases of perjury. f. 9.

- 11 No counsellor or attorney can justify using any *deceitful practice* in maintenance of a client's cause. 512 f. 29

- 12 By 11 Wm. 1. c. 20. if any servant, pleader, or other, in any manner of deceit or collusion to the king's court, &c. he shall be disqualified, &c. &c. *ibid.*

DECIES TANTUM.

- 1 By 38 Edw. 3. c. 10. if any undertaker bribe to give evidence in a suit, he shall pay *ten times as much* as he has thus done, himself to any who will sue for the same as directed by 34 Edw. 3. c. 8. 551
- 2 It is a good plea in bar to actions of *decies tantum*, that there was no such cause as that in which it is alleged the juror was bribed. f. 11
- 3 A variance between the first record and the declaration on this statute will abate the writ. *ibid.*
- 4 But only so much of the record need be stated as is necessary to give the plaintiff his action. *ibid.*

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- 5 The declaration must shew that the bribe was given to the juror. *Page 551*
f. 12
- 6 So also the precise sum given must be stated. f. 13
- 7 But money given, after verdict, is not within the act, unless in consequence of a previous contract. f. 14
- 8 Whether a verdict was, or was not given, is immaterial. f. 15
- 9 If several be joined in one action they should plead separately. 552
- 10 Which should be a special denial if not receiving the money and not the general issue. f. 17
- 11 The plaintiff shall be paid his moiety or a *decies tantum* before the king, &c. f. 18
- 12 The husband may sue alone, although the offence were committed in a suit to which both husband and wife were parties. f. 19
- 13 No colourable purchase of land shall evade the statute. f. 20
- 14 This action may be barred by the king's release, *before action brought by the informer*. f. 21
- 15 Outlawry lies not in *decies tantum*, only a *capias*, and distress infinite. f. 22
- 16 And no *capias* lies in a foreign country. *ibid.*
- 17 The penalty can only affect lands had at the time of the *decies tantum*, &c. f. 23
- 3 By 9 Geo. 1. c. 22. if any person shall appear *armed and disguised* in any inclosed place wherein any deer are kept, or shall unlawfully hunt, or destroy any fallow deer; or *whether armed and disguised or not*, shall kill, or steal any red deer in the king's inclosed chases or forests, shall suffer without clergy. *Page 107*
- 4 The offender may be proclaimed, and not submitting, he shall be adjudged guilty of felony without clergy. 187
- 5 By 5 Geo. 1. c. 28. whoever shall enter into any inclosed grounds where deer are usually kept, and wilfully hunt or kill any red or fallow deer without licence from the owner, he shall be transported for seven years. 188
- 6 By 16 Geo. 3. c. 30. whoever shall kill, &c. or attempt to kill, wound, or destroy, or shall steal any fallow deer, or shall aid therein, shall forfeit 20*l.* for attempting, &c. 30*l.* for killing, &c. if a keeper, double, and on a second conviction of any of these offences, the offender shall be transported. *ibid.*
- 7 Justices may search for the skins, &c. of stolen deer, and if any be found, and the party shall not give a satisfactory account how he became possessed of it, he shall forfeit any sum between 10*l.* and 30*l.* 190 f. 2
- 8 And if the person in whose custody the same shall be found shall not be liable to conviction, the justices may summon all those through whose hands such skin, &c. shall have passed, &c. 190
- 9 Whoever shall *lay snares* for deer, shall forfeit from 5*l.* to 10*l.* for the first offence, and from 10*l.* to 20*l.* for every other. 191
- 10 And whoever shall come *armed* into any ancient walk, inclosed ground, *with intent* to shoot at or to take any deer, the rangers may seize guns and dogs in the same manner as game-keepers. *ibid.*
- 11 And if any such person shall there beat or wound any ranger, &c. or his assistants

DECLARATION.

- 1 How far it is criminal to refuse the declaration against Popery. c. 14

DEER.

- 1 By the common law, deer *feræ naturæ*, and roving at large, are not the subject of larceny. 144 f. 26
- 2 But if shut up in a house, or even inclosed in a park in such a manner as the owner may retake them whenever he pleases, felony may be committed by taking them. *ibid.*
- 3 And if any such person shall there beat or wound any ranger, &c. or his assistants

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assistants in the execution of his office, or shall attempt to rescue any offender, he shall be transported for 7 years. *Page 191 f. 10*

DEFAMATION.—*Vide Libel.*

DEFENCE.

- 1 A man in defence of his person may justify killing another who assaults him feloniously. *109 f. 24*
- 2 But *quere*, if the assault is made where the person may safely retreat. *f. 25*
- 3 By 24 Hen. 8. c. 5. whoever shall be indicted for killing another attempting murder, robbery, or burglary, shall be fully acquitted and discharged. *110*

DEMOLITION.

- 1 By 1 Geo. 1. c. 5. Riotously, tumultuously, and forcibly, to demolish or to pull down, or to begin to demolish or pull down, any church, chapel, or meeting-house, or any dwelling-house, barn, stable, &c. &c. is felony without clergy. *308*
- 2 By 9 Geo. 3. c. 29. the above act is extended to the demolition of all kind of mills. *309*

DEODANDS.

- 1 Is a forfeiture to the king of the instrument which occasions the death of another. *100*
- 2 Especially such as occasions casual death. *ibid.*
- 3 As where one is killed by a fall from a horse, cart, or other thing. *ibid.*
- 4 And it is due for the death of infants as well as adults
- 5 The origin of this forfeiture. *ibid.* (N) 1
- 6 Fixtures, as a wheel of a mill, &c. may be a *deodand*. *101*
- 7 But a ship is not. *ibid.*

8 And only the very particular part of the thing which causes the death, is forfeited. *Page 101*

- 9 Nothing forfeited if the party die not within the year and day. *ibid. f. 7*
- 10 Nor till after inquisition. *f. 8*
- 11 But it is an odious claim and not favoured by the courts *102 (N) 3*

DEROGATION.

- 1 To derogate from the king's common law courts is *præmunire*. *79 f. 14*
- 2 The punishment for speaking in derogation of the common prayer. *14 f. 5*

DESERPTION.

- 1 By 1 Geo. 1. c. 47. if any person shall persuade a soldier to desert, he shall forfeit 40*l*. *75*
- 2 By 18 Hen. 6. c. 19. desertion was made felony, but this statute is obsolete. *184*
- 3 By 3 Hen. 8. c. 5. Desertion is felony without clergy. *135*
- 4 By 2 Edw. 6. c. 2. if any soldier shall depart without licence, &c. &c. he shall be guilty of felony without clergy. *ibid.*

DETAINER.—*See Forcible Entry.*

DEMURRER.

- 1 Judgment on demurrer or *nihil dicit* is a sufficient conviction on the 23 Eliz. c. 1. for the penalty of 20*l*. a month for absents from church. *20 f. 9*

DENIZEN.—*Vide Allegiance.*

DENYING.

- 1 It is a high contempt to deny the king's title. *93*

See 2

DEPRAVING.

A TABLE OF PRINCIPAL MATTERS.

DEPRAVING.

- 1 The punishment for depraving the book of common prayer. *Page 14 f. 5*

DEPRIVATION.—See *Spiritual Courts.*

- 1 Ministers, offending against the 1 Eliz. c. 2. respecting the use of the common prayer, may be deprived by the spiritual court for the first offence. *14 f. 4*

DEPUTY.

- 1 A Bond by a deputy of an office to pay a certain sum, at all events, is bribery. But a bond to pay half the profits, or a certain sum out of the profits of an office, for a deputation, is not. *313*

DICE.

- 1 Playing with false dice, is an indictable offence. *343 c. 71*
- 2 It is punishable with *infamy*, fine and imprisonment. *344 f. 3*
- 3 By 16 Car. 2. c. 7. if any person shall defraud another by playing at dice, &c. or by betting on the side of such as do play, he shall forfeit treble what is won. *345 f. 8*
- 4 By 9 Ann. c. 14. he shall forfeit five times the value, be deemed infamous, and suffer as in cases of perjury. *f. 9*

DIMINUTION.

- 1 By 18 Eliz. c. 1. to impair, *diminish*, falsify, scale, or lighten the coin, &c. is high treason. *63*

DISABILITY.

- 1 Those who are under a *natural disability* of distinguishing between good and evil: as infants under the age of

discretion, idiots, and lunaticks, are not punishable by any criminal prosecution whatsoever. *Page 1, 2*

- 2 But in trespass, this disability shall not excuse from making a civil compensation for the injury. *3. f. 5*
- 3 In what cases a *feme covert* is disabled from committing crimes, by the command or coercion of her husband.
- 4 The disabilities to which a man is reduced by the offence of Popish recusancy. *32 to 35*
- 5 Disabling a man of those parts which abate his courage, &c. or which prevent his fighting, are held maims. *175*

DISCOVER.

- 1 What discovery is necessary to exempt a person from the crime of treason. *87*
- 2 What discovery will indemnify against the penalty for bribery at elections. *315*

DISCRETION.—*Vide Infancy. Lunatick. Idiot.*

- 1 Where the human mind is incapable of discretion, it is also incapable of guilt. *1*
 - 2 Infants under the age of discretion are not punishable by any criminal prosecution. *2*
 - 3 The law presumes them to have acquired discretion on the attainment of fourteen years of age. (N) *1*
 - 4 But from seven to fourteen years of age, if they appear to possess discretion they are liable to punishment. *ibid.*
 - 5 But within the age of seven years, no discretion shall be presumed, whatever circumstance may appear. *ibid.*
 - 6 Idiots and lunaticks are supposed to be without discretion. *ibid.*
 - 7 But every person of the age of discretion is presumed of sane memory unless the contrary appear. *3 (N) 5*
 - 8 In what cases the magistrate may exercise his discretion in taking surety for the good behaviour. *262*
 - 9 The measure of punishment for offenders to be regulated by the discretion of the judges. *270. f. 20*
- 10 How*

A TABLE OF PRINCIPAL MATTERS.

- 10 How far the king's bench may exercise a discretion over the conduct of the justices granting a restitution of forcible entry. *Page* 292. f. 63 to 66
- 11 Persons wanting discretion who commit a trespass against another shall make reparation in damages. 3. f. 5
- 12 The indiscretion of drunkenness is no excuse from punishment. f. 6

DISFIGURING.—*Vide Maim.*

- 1 Cutting off the ear, nose, or the like, of another are not *maims* by the common law, because they do not *weaken*, but only *disfigure* the party. 176
- 2 By 22 & 23 Car. 2. c. 1. whoever shall, by lying in wait, cut out or disable the tongue, &c. or any limb or member of another with *intent to maim or to disfigure him*, his aiders, abettors, &c. shall be guilty of felony, *sans clergy*. *ibid.*

DISGUISE.—*Vide Black Act. Smuggling.*

DISMEMBERING.—*Vide Maim.*

DISOBEDIENCE.

- 1 It is a high contempt to disobey the king's lawful commands and prohibitions. 91

DISPENSATION.

- 1 No dispensation whatsoever shall restore an offender against 5 & 6 Edw. 6. c. 16. to a capacity to hold the office he has contracted for. 313. f. 5

DISSEISIN.—*Vide Forcible Entry.*

- 1 It is fatal to an indictment of forcible entry to alledge a *disseisin* of such estates of which a person cannot be disseised as a lease for years, a copyhold, &c. 285. f. 39
- 2 So also if it state the disseisin to be of land *ad tunc & adhuc existens liberum tenementum*, I. S. &c. *ibid.*
- 3 But *quere* if this repugnancy may not be reconciled by intending that the

disseisee might re-enter after the disseisin and before the indictment. *Page* 285. f. 39

- 4 In what manner the time and place of the disseisin in forcible entry are sufficiently set forth. 286. f. 42 to 45

DISSENTERS.

- 1 May by virtue of the toleration act, 1 W. & M. c. 18. refuse to take the oaths of office required by the corporation and test acts of 13 Car. 2. c. 1. and 25 Car. 2. c. 2. and may refuse to serve the office of sheriff, upon account of not chusing to take the oaths, &c. notwithstanding they be duly elected; and the 5 Geo. 1. c. 6. confirms officers in their offices who have not qualified as above required. 16 (N) 2
- 2 Dissenters taking the oaths directed by 30 Car. 2. are not within 23 Eliz. c. 1. 18 f. 3
- 3 Protestant dissenters exempted by the toleration act from all penal laws relating to religion, except 25 Car. 2. c. 2. and 30 Car. 2. c. 1. provided they take the oaths, &c. and attend a registered place of worship, &c. 47
- 4 In registering such place, the justices are merely ministerial; and if the parties are not within the certificate, they are not protected. 47 (N) 1
- 5 Nor will the act protect any but real dissenters. *ibid.*
- 6 Dissenting teachers tolerated *ibid.* &c.
- 7 May qualify, pending prosecution. 48
- 8 Those who scruple to take the oaths are within the protection, provided they subscribe the declaration. *Id.* f. 3
- 9 Spiritual courts cannot proceed against persons maimed in a licensed conventicle. 40 f. 4
- 10 Dissenting ministers or teachers who scruple to take the oaths are to subscribe the declaration directed by 19 Geo. 3. c. 44. *ibid.*
- 11 But this does not intitle them to hold the mastership of any royal college, &c. *ibid.*
- 12 How far the law favours dissenters and how the act of toleration is to be construed. 49

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DISORDERLY HOUSES.—*Vide*
Barwy-bouffe. Debating. Lord's Day.

DISORDERLY PERSONS.—*Vide*
Vagrants.

DITCHES.—*Vide* *Highways.*

1 By the common law, the tenant of the lands adjoining to highways are bound to scower their ditches. *Page*

368 f. 5

2 But not those who have lands next adjoining to such lands, unless by prescription. 405 f. 52

3 By 13 Geo. 3. c. 78. f. 30. all occupiers of lands are liable to be rated toward the making tunnels for scowring of ditches. 379 f. 20

4 Surveyors of the highways may order all nuisances in, or obstructions of ditches, &c. to be removed, on personal notice thereof to the occupier, and if not removed within twenty days, the surveyor shall remove them at the expence of the occupier who shall pay one penny a foot, &c. 395

5 The possessor of land next adjoining every highway, shall make ditches, &c. of a sufficient depth and breadth, for keeping the highways dry, and shall scow and cleanse the same, and make sufficient trunks, tunnels, &c. on pain of 10s. after ten days notice by the surveyor. 406 f. 55

6 The surveyor, by order of one justice, shall make new ditches and drains in and through the adjoining lands, or any other lands if necessary; and to keep such ditches, &c. scoured, &c. the surveyor, with proper workmen, may go upon the land. 407

7 Surveyors shall make proper trunks, &c. over such ditches, for the convenient use of the lands; keep the same in repair; and make satisfaction to the owner for the damage sustained thereby. f. 57

8 If any person, in making, cleansing, or scowring the ditches, shall permit the soil thrown out, to obstruct or prejudice the highway, for five days after notice by the surveyor, he shall forfeit 10s. 408 f. 62

9 If any person shall encroach on the highway, by making any ditch within 15 feet from the centre, &c. &c. he shall forfeit 40s. and the same shall be filled up again at the expence of the offender. *Page* 407

10 How far the powers given by the highway acts relating to ditches, &c. may be extended to turnpike roads. 441

D I V O R C E.

1 Persons divorced *a vinculo matrimonii*, or even *a mensa et thoro causa adulterii vel fornicationis* may marry again without incurring the penalties of bigamy by 1 Jac. 1. c. 11. 174 f. 5

2 And for this purpose the word *separatus* without the word *divortianus* in the sentence will be sufficient. *ibid.*

DIVINE SERVICE.—*Vide* *Char. b. Absence.*

D O G S.

1 It is no felony at common law to steal dogs, because they are things of a base nature. 143

2 But by 10 Geo. 3. c. 18. whoever shall steal dogs from the owner, or from any person intrusted with them by him, or shall knowingly buy, sell, receive, harbour, or detain stolen dogs, or shall have the skin thereof in his custody is liable to certain pecuniary penalties, &c. *ibid.*

3 *Quere*, Whether the stealing a bitch is within the penalties of this act. (N) 3

4 The particular sort of dog stolen must be described. *ibid.*

D O O R S.

1 The constable may break open doors to suppress an affray, and if the offenders fly and take refuge in a house, he may break open the doors to apprehend them. 259 f. 16

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DOVE COTE.

- 1 A dove cote, either erected by the lord or his tenant, is not a common nuisance. *Page 362 f. 8*
- 2 It may be justified by prescription. *ibid.*
- 3 It is demandable in a præcipe before any land whatsoever which is not built upon. *ibid.*
- 4 The owner of a dove cote may justify taking another's hawk flying at his pigeons. *ibid.*
- 5 But a tenant is liable to an action on the case for building a dove cote without licence from the lord. *ibid.*
- 6 But by 1 Jac. 1. c. 27. and 2 Geo. 3. c. 29 the keeping pigeons as therein prohibited, is a nuisance. *ibid.*

DOWER.

- 1 The wife of a *felo de se* is not barred from her dower by the felony of her husband. *103 f. 8*
- 2 A title to dower from a house of which a wife is trustee, is not a sufficient possession to avoid the guilt of arson if she set fire to it during the term of her lease. *166(N)*
- 3 A statute which saves corruption of blood; or land, to the heir, impliedly saves the wife's dower. *169 f. 5*

DROVER S.—*Vide Salesman. Cattle.*

- 1 By 29 Car. 2. c. 7. no drover, horse courier, waggoner, butcher, or higgler, shall travel, or come to their inn on the Lord's day, on pain of 20*s.* *11 f. 3*

DRUNKENESS.

- 1 A voluntary drunkard shall be punished for the crimes committed during his intoxication, as much as if he were sober. *3 f. 6*

- 2 By 4 Jac. 1. c. 5. the offence of drunkenness incurs a penalty of 5*s.* to the poor. *Page 13 f. 5*
- 3 By 22 Geo. 2. c. 33. seamen shall be punished for this offence in the discretion of a court-martial. *ibid.*
- 4 A publican permitting drunkenness in his house, shall forfeit 10*s.* *466 f. 43*
- 5 By 21 Jac. 1. c. 7. drunkards shall forfeit 5*s.* *467, 468*
- 6 The punishment inflicted on repeated tippling. *468*

DUCKING STOOL.

- 1 A common scold is punishable by the ducking stool. *365*

DUEL.—*Vide Challenge. Affray.*

- 1 If two persons meet and fight in cool blood upon a precedent quarrel, and one is killed, the other is guilty of murder. *122 f. 21*
- 2 And it is no excuse that the deceased struck first; or that the killer had often declined to meet him; and was only prevailed upon by his importunity; or that he only intended to vindicate his reputation; or that he only meant to disarm his adversary. *ibid.*
- 3 So, if two quarrel and appoint a distant time to fight, as from night to morning, or from morning to the afternoon, it may reasonably be presumed the blood was cooled in the interval. *f. 22*
- 4 And the same construction shall be made upon a sudden quarrel, if it appear that either of the parties was master of his temper at the time. *ibid.*
- 5 And not only the principals, but the second to the killer also is guilty of murder. *124 f. 31*
- 6 But it seems that the second to the person killed *should yet* be involved in his guilt. *ibid.*
- 7 And barely to challenge to a duel, by letters, words, or provoking language, or

A TABLE OF PRINCIPAL MATTERS.

or to be the messenger thereof, is a very high misdemeanor. *Page 266 f. 3*

- 8 By 9 Ann. c. 14. f. 8, to challenge or provoke another to fight, on account of money won at play, is forfeiture of goods and imprisonment 2 years.

266

D U R E S S.

- 1 In what cases it will exempt from the guilt of treason. *54, f. 24(N)3*

DUTIES.—*See Smuggling. Permits.*

E

E A R.

- 1 **B**Y 5 & 6 Edw. 6. c. 4. to strike with a weapon in a church or churchyard, is loss of an ear, &c. 271
- 2 By 2 and 3 Edw. 6. c. 15. against combinations among victuallers, &c. the offender shall lose an ear, &c. &c. 481
- 3 Cutting off a man's ear is not mayhem by the common law. 175 f. 2
- 4 But by 22 and 23. Car. 2. c. 1. if done with intent to maim or disfigure the person, it is felony without clergy. 176 f. 4
- 5 By 37 Hen. 8. c. 6. if a man shall maliciously cut off the ear of another, he shall forfeit treble damages and 10*l.* *ibid.* f. 7.
- 6 By 5 Eliz. c. 11. against forgery of deeds relating to real estates, the offender shall have both his ears cut off, and for any forgery relating to a term of years, &c. he shall lose one ear, &c. 339, 340

E A S E M E N T.

- 1 An easement, as a right or way or the like, is not that sort of possession

which is within the statutes against forcible entries. *Page 232*

E A V E S D R O P P E R S.

- 1 Eaves droppers are such as listen under windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales to the common nuisance, are presentable at the leets, indictable at sessions, and punishable by fine and finding surety for good behaviour. 262 f. 4

E C C L E S I A S T I C A L.

- 1 A force done to ecclesiastical possessions, as churches, vicarage houses, &c. is as much within the statutes against forcible entries, as if it were done to any temporal inheritance. 281 f. 31
- 2 All persons ecclesiastical or temporal, are liable to punishment for high treason. 501. 4
- 3 The jurisdiction of the ecclesiastical court is saved by the statute against tithing. 468 f. 49
- 4 So also it is saved by 5 Eliz. c. 9. against perjury and subornation. 327 f. 13
- 5 The 1 Eliz. c. 2. against ministers not using the common prayer, also serves the jurisdiction of the ecclesiastical court. 14 f. 4
- 6 The 5 Eliz. c. 14. against forging deeds, wills, &c. shall not extend to any officers of the ecclesiastical court, who shall officially set his name to any such writing, &c. 341
- 7 The offices of chancellor, register, and commissary in ecclesiastical courts are within 12 Rich. 2. c. 2. against buying offices. 313 f. 4
- 8 How far suits in the ecclesiastical courts are within the 16 Rich. 2. c. 5. which puts all those out of the king's protection who shall sue out process in the court of Rome or elsewhere. 801. 18, 19.

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9 In proceedings in the ecclesiastical court against hereticks, the appeal is to higher spiritual courts, and not to those of common law for a prohibition. *Page 7 f. 9*

10 In what cases the ecclesiastical courts may be prohibited from proceeding on 1 Eliz. c. 2. for absence from church. *19 f. 1*

11 The jurisdiction of the ecclesiastical court over the offence of heresy. *6, 7*

12 A suit in the ecclesiastical court is not within the statutes against maintenance. *545 f. 46*

13 How far an affirmative statute saving the jurisdiction of the ecclesiastical courts, leaves them open to inflict spiritual penalties on offenders. *14 f. 4*

EDUCATION.—*Schools.*

1 By 1 Jac. 1. c. 4. to send any child abroad, for the purpose of being educated in the Popish religion, incurs a penalty of 100 l. *42 f. 1*

2 And the persons so sent shall be disabled to inherit, &c. *ibid.*

3 By 3 Jac. 1. c. 5. if the children of any English subject not being mariners, &c. &c. shall be sent abroad to prevent their good education in England, they shall be disabled, &c. unless they take the oath of obedience, &c. and the person sending such child shall forfeit 100 l. *43*

4 By 3 Car. 1. c. 2. if any person shall go abroad to be strengthened in the Popish religion, they shall forfeit all goods, hereditaments, &c. &c. *43 f. 3*

EFFUGAVIT.

1 In what case necessary in an indictment for larceny. *134. f. 2*

E G G S.

1 Larceny may be committed by taking the eggs of any swans *marked and pinioned.* *144 f. 27*

2 But by 1 Hen. 7. c. 17. a lesser punishment is appointed for this offence, *ibid.*

3 And there is no doubt but that the taking the eggs of ducks, hens, &c. is felony. *Page 144. f. 28*

E G Y P T I A N S.

1 Of the age of 13 years remaining in England one month forfeit *40 l.* *198 c. 54*

2 Persons pretending to be Egyptians deemed rogues and vagabonds. *ibid.*

ELECTION.—*Vide Bribery.*

1 If a statute ordain a forfeiture, or imprisonment, at the election of the party, *quere* if the party die within the time limited for the payment, whether the forfeiture be discharged. *14 f. 6*

2 It is in the election of the crown to either proceed upon the old statutes which make purchasing *bulls* from Rome high treason, or upon 13 Eliz. c. 2. which reduced the offence to *præmunire.* *79 f. 13*

3 So also government may proceed against *nonjurors* either on the statutes of *præmunire* or on the modern and milder statutes. *96 f. 5*

4 By 13 Car. 2. c. 1. members of corporations must have received the sacrament within one year before their election. *15*

5 But by 5 Geo. 1. c. 6. such election is good notwithstanding the omission of receiving the sacrament. *15, 16*

6 By 11 Geo. 1. the oaths shall be taken before the person who presides at the election of corporate officers. *16*

7 To refuse to elect the person nominated by the king to a bishoprick is *præmunire.* *80 f. 22*

8 If either of the universities neglect to elect a member in the place of one disqualified by not taking the oath, &c. the king may appoint. *98 f. 9*

9 In what manner surveyors of the highways shall be elected. *389*

ELOPEMENT.

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E L O P E M E N T.

- 1 By 4 and 5 Phil. and Mary. c. 8. whoever above the age of 14 shall induce a woman child of 16 years unmarried to elope from and against the consent of her guardians, shall suffer two years imprisonment and fine at discretion. *Page 172 f. 10*
- 2 And if the offender despoil or marry her, five years imprisonment and fine as before. *ibid.*
- 3 And if any female above 12 shall consent to unlawful matrimony, she shall forfeit all her lands to the next of kin during her life. *172, 173*
- 4 This forfeiture extends as well to the infant who consents, as to the husband who takes. *173 (N) 2*
- 5 The marriage must be *clandestine* and to the disparagement of the heiress. *ibid.*
- 6 If the guardian once consents, he cannot retract. *ibid.*
- 7 A bastard under the care of her putative father, is within this act. *ibid.*
- 8 The offence is within the jurisdiction of the King's Bench. *ibid.*
- 9 And the court will grant an information against the offender. *ibid.*

E L M.—*Vide Fines.*

E M B E Z Z L E M E N T.

- 1 By 31 Eliz. c. 4. if any person having the charge of the king's stores, shall embezzle the same to the value of 20 s. he shall be guilty of felony. *75 f. 18*
- 2 By 22 Car. 2. c. 5. the benefit of clergy is taken from this offence. *ibid.* (N)
- 3 By 7 Jac. 1. c. 7. if any manufacturer of wool, &c. shall embezzle any wool or yarn delivered to him to work, he shall be whipped, &c. &c. *139 f. 17*
- 4 By 17 Geo. 3. c. 56. how servants in the hat, woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax, mchairs, silk or dying manufactures,

embezzling the materials entrusted to their care shall be punished. *Page*

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- 5 By 3 & 4 W. & M. c. 9. if any person shall take away the furniture of their lodging, with intent to embezzle it, they shall suffer as in case of felony. *137 f. 10*
- 6 By 21 Hen. 8. c. 7. if any servant shall embezzle his master's jewels, money, goods, &c. intrusted to his care, to the amount of 40 s. he shall be guilty of felony. (*Vide Larceny.*) *138 f. 11*
- 7 By 15 Geo. 2. c. 13. if any officer of the bank shall embezzle any part of the property intrusted to his care, he shall suffer without benefit of clergy. *139, 140*
- 8 By 5 Geo. 3. c. 25. servants of the post offices embezzling any letter or packet, or bag of letters, containing any security for money, shall suffer death without clergy. *140*
- 9 For the offence of embezzling naval stores. (*Vide Naval Stores.*) *562*
- 10 What punishment shall be inflicted for embezzling of records. (*Vide Records.*) *177 c. 45*

E M B R A C E R Y.

- 1 Every *corrupt* attempt to influence a jury in their verdict, although no verdict is given, is embracery. *548 c. 85*
- 2 Even a stranger shall not desire a juror to appear and act *unconscientiously*. *549*
- 3 Giving money to a juror after verdict, *jurors* of this offence. *f. 3*
- 4 But not if it be their usual allowance. *ibid.*
- 5 Giving money to another to distribute among them, is of the nature of embracery, although not distributed. *f. 4*
- 6 Nor shall even a juror *practise* on his companions. *ibid.*
- 7 Procuring to be a juror for partial purposes, is criminal. *ibid.*
- 8 It is altogether unlawful for any person to tamper with a jury. *f. 5*
- 9 But whoever may justify any other act of maintenance may desire a juror to appear. *f. 6*

10 The

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- 10 The offender is liable to either an indictment or an action. *Page 550 f. 7*
- 11 And if the party prejudiced is ignorant of the embracery so as to prevent his challenging the juror, it is a good cause to set aside the verdict. *ibid.*
- 12 By 5 Ed. 3. c. 10. the juror corrupted shall be disqualified and imprisoned, and the court are empowered to enquire of the offence. *f. 8*
- 13 By 34 Ed. 3. c. 8. the parties who shall sue embraced jurors, shall be heard immediately by the court, and the juror put to plead *maintenant*, &c. *f. 9*
- 14 By 38 Ed. 3. c. 12. every juror or embracer attempted upon the above statute, shall pay *ten times as much* as he receives; half to him that will sue, &c. or be imprisoned for one year. *551 f. 10*
- 15 What may be pleaded in *bar*, or *abatement*, to a *decies tantum*. *f. 11*
- 16 In *decies tantum* it must be shewn that the money was given to the juror. *f. 12*
- 17 The plaintiff must shew how much the juror received. *f. 13*
- 18 Money given after the verdict, is not within the act, unless in consequence of previous agreement. *f. 14*
- 19 And it is immaterial whether a verdict was given or not. *f. 15*
- 20 All the jurors or embracers may be joined in one action, but they ought to plead severally. *552 f. 16*
- 21 They ought specially to deny taking the money. *f. 17*
- 22 The prosecutor's half of the fine shall be paid before the king's. *f. 18*
- 23 A husband alone may bring *decies tantum* for embracery, where he and his wife were parties. *f. 19*
- 24 The difference between money given for land, and the real worth of the land shall be considered as money received. *f. 20*
- 25 This action may be barred by the king's release, but not by the parties. *f. 21*
- 26 How the party may declare in *decies tantum*. *ibid.*
- 27 Outlawry does not lie in this action. *f. 22*
- 28 What process does lie. *ibid.*
- 29 No *capias* into a foreign county lies against the jurors. *Page 552 f. 22*

EMISSION.

- 1 In sodomy, there must be evidence of emission as well as penetration; but emission is *prima facie* evidence of penetration. *9, 10*
- 2 No assault, with intent to ravish, can amount to a rape, unless it proceed to some degree of penetration, and also of emission; but evidence of emission is *prima facie* evidence of penetration. *169*

ENDS of BRIDGES.

- 1 How the roads at the ends of bridges shall be repaired. *448, 451*

ENEMY.—*Vide Treason.*

- 1 No persons can be guilty of an affray by assembling and arming, in order to oppose enemies. *268*
- 2 If a man be adherent to the king's enemies in his realm, he is guilty of high treason. *50 f. 3*
- 3 Alien enemies, invading the kingdom in a hostile manner, are to be dealt with by martial law. *51 f. 6*
- 4 What shall be said to be an adherence to the king's enemies. *55 f. 28*
- 5 How far intercepted letters to the enemy are proofs of high treason. *56 (N) 7*
- 6 By 22 Geo. 2. c. 33. to destroy any ship, &c. not appertaining to the enemy, &c. is death, on conviction by a court martial. *76*

ENGLISH COUNTY.

- 1 Salop is considered as the next adjoining English county to Wales. *220, 221*

ENGINES.—*Vide High Treason.*

- 1 By 8 & 9 Will. 3. c. 36. whoever shall make or mend any engine, not
of

A TABLE OF PRINCIPAL MATTERS.

- of common use in any trade, but contrived for marking of money round the edges with letters, &c. Or any cutting engine, for cutting round blanks by force of a screw, out of flatted bars, &c. shall be guilty of high treason. *Page 64*
- 2 If any such engine shall be elsewhere found than in the custody of the king's minter; they may be seized, carried before a justice, and destroyed. *65*
- 3 By 7 Geo. 3. c. 29. to burn, destroy, or damage, any engine, for drawing water from collieries, is transportation for seven years. *238 f. 4*
- 4 How, and by what authority, weighing engines, for turnpike roads, shall be erected. *428*

ENGLISH CHIRE.

- 1 Anciently murder signified privately killing; therefore CANUTE passed a law for the preservation of his *Danes*, that the town where the fact happened, should be *amerced*, unless it was proved that the person slain was an *Englishman*, and this proof was called *Engelsbore*. *114 f. 22. 117 f. 1*
- 2 This law abolished by 14 Ed. 3. c. 4. *ibid. f. 2*

ENQUEST.—*See Inquisition. Armour.*

ENGROSSING.

- 1 Enhancing, by any means, the prices of merchandize and victuals. *477. f. 1 and 2*
- 2 Importers of merchandize may sell in gross; but no persons can buy and sell in gross within the realm. *f. 3*
- 3 A bare intent to sell an engrossed commodity at an unreasonable price is indictable at common law whether any part be sold or not. *f. 3*
- 4 Corn cannot be sold in the sheaf. *f. 4*
- 5 How this offence was anciently punished. *f. 5*
- 6 At this day offenders are liable to fine and imprisonment. *480*
- 7 By 23 Edw. 3. c. 6. all dealers in victuals shall sell the same for a reasonable price on pain of double value *480 f. 6*

- 8 Butchers selling unwholesome meat how punished. *Page 480*
- 9 Restrained from killing beasts in walled towns. *ibid.*
- 10 When calves shall be killed. *ibid.*
- 11 Aliens in amity may sell the victuals they import. *f. 7*
- 12 Penalty for preventing them. *ibid.*
- 13 By 25 Hen. 8. c. 2. the chancellor and other great officers of state may, upon complaint of their being enhanced, fix and regulate the price of victuals. *481*
- 14 By 2 & 3 Edw. 6. c. 15. none shall conspire not to sell victuals, or not do work but at certain prices; and those who shall so conspire to leave work unfinished, or only to do certain work in a day; or, at certain hours, &c. they shall forfeit, &c. *f. 10*
- 15 And if such conspiracy shall be formed by the major part of any of the companies mentioned, their incorporation shall be thereby dissolved. *ibid.*
- 16 By 2 Geo. 3. c. 14. no victualler or publican shall be sued for advancing the price of malt liquors in a reasonable degree. *482*
- 17 No brewer shall mix strong beer or worts with small beer or small worts, on pain of 50*l.* *ibid.*
- 18 The statutes against forestalling, ingrossing and regrating repealed. *f. 11*
- 19 Whoever shall buy victuals *in their way* to market, is a forestaller. *f. 13*
- 20 Whoever shall buy victuals and sell them again in the same market, or within 4 miles thereof is a regrator. *f. 14*
- 21 Whoever shall get into his hands any victual, grown or produced by another is an ingrosser. *f. 15*
- 22 Salt is comprehended under the word victuals. *f. 16*
- 23 But hops, malt, apples, pears, &c. are not. *f. 17*
- 24 Nor can a person ingross by buying corn in order to make starch of it; or to make malt, or meal. *f. 18*
- 25 In what manner the indictment or information should be framed. *f. 19, 20, 22*
- 26 The punishment by statute, for this offence. *f. 21*

ENLIST

A TABLE OF PRINCIPAL MATTERS.

ENLISTING.—*Vide Soldier.*

- 1 By 9 Geo. 2. c. 30. whoever shall enlist himself, or procure another to enlist, or hire another with intent to cause him to enlist, or procure another to embark in order to be enlisted to serve any foreign prince without licence, &c. although no enlisting money be paid, is felony without clergy unless within 14 days the offender discover his seducer. *Page 74 f. 16*
- 2 By 29 Geo. 2. c. 17. to enlist into the military service of the French king as an officer without licence, is felony without clergy. *75*
- 3 To enlist as a commission officer into the Scotch brigade in the Dutch service is a forfeiture of 500 l. *ibid.*

ENTICING.—*Vide Artificers. — Soldiers.*

ENTERTAINMENT. — *Plays. — Lord's Day.*

ENTRY.—*Forcible Entry. Burglary.*

- 1 The words *fregit & intravit* are both essentially necessary in an indictment for burglary; and both must be satisfied. *160*
- 2 Any the least *entry*, either with the whole or with but part of the body, or with any instrument or weapon will satisfy the word *intravit*; as if one do but put his foot over the threshold, or his hand, or a hook or a pistol within the window. *161*
- 3 But the entry made, or *thing* introduced, must be for the purpose of committing felony. *162*
- 4 Therefore an entry made with an instrument for the purpose of breaking, and not for the felonious purpose, is not such an *entry* as will satisfy the word *intravit*. *ibid. (N) 1*
- 5 An actual *entry* in all cases is not necessary. *f. 8*

- 6 An *entry* obtained by fraud or collusion is sufficient. *Page f. 9*
- 7 What acts of violence shall constitute a *forcible entry* within the statutes of forcible entry and detainer. *276 to 280*
- 8 The manner in which the copy right of authors must be entered at Stationer's Hall, in order to protect their property in the copy. *476*

ENTAIL.

- 1 The forfeiture of all lands and tenements by 16 Rich. 2. c. 5. *for premunire*, extends not to land entailed after the death of the offender. *85. f. 48*

EQUITY.

- 1 Whoever hath an equitable interest in lands or goods may lawfully maintain another in an action relating thereto. *539. f. 17*

ERASURE.

- 1 Erasing the name of one man out of a patent, and putting in that of another, or any artifice removing of the true writing altogether new, &c. from any instrument to which the seal is affixed, is not within the statute of treasons as counterfeiting the king's great and privy seal. *31. f. 52*
- 2 By 11 Geo. 1. c. 9. to erase or alter a bank note or any indorsement, &c. thereon, is felony without clergy. *205*
- 3 And to obliterate the red mark usually made on payment, is an erasure. *ibid.*
- 4 It is not forgery under the 5 Eliz. to erase the word *libris* from a bond and insert *marcis* instead thereof. *337. f. 4*

ERECTION.—*Vide Nuisance.*

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ERROR.

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E R R O R.

- 1 What species of error may properly be called heretical. *Page 6. f. 2*
- 2 A writ of error cannot be brought on any record which is not a judgment. *24. f. 23*
- 3 Error, tending to the king's prejudice may be assigned on a conviction for not coming to church; but no other error. *25. f. 29*

ESTREAT.—*Vide Recognizance.*

ESCAPE.—*Vide Homicide. Execution. Quarantine.*

- 1 An officer may justify homicide of a prisoner who resists, being retaken upon an escape without giving back at all. *107. f. 17*
- 2 Of homicide where the direct design is to escape from an arrest. *129. f. 55*
- 3 If a bankrupt is likely to escape, he may be committed. *204. (N) 1*
- 4 By 26 Geo. 2. c. 26. if any person shall escape out of the house, lazaret, or place appointed for the performance of *quarantine*, he shall suffer death without clergy. *242. f. 5*

ETCHING.—*Vide Forgery.*

- 1 By 13 Geo. 3. c. 79. to etch, &c. in mezzotinto, upon any material, any bill containing the words BANK OF ENGLAND, or BANK POST BILL, &c. is imprisonment for six months. *206*
- 2 By 8 Geo. 2. c. 13. whoever shall etch, &c. in mezzotinto or chiaro-oscuro any original print, shall have the sole right of printing and reprinting the same, &c. *477*
- 3 By 23 Geo. 3. c. 30. to etch, &c. the words EXCISE OFFICE in any paper for granting permits, is felony without clergy. *565*

E V A S I O N.

- 1 No woman, by using fraudulently, the process of the law, in order to obtain the goods of another, shall excuse the party from the guilt of larceny. *Page 136. f. 8*
- 2 Nor shall the evasion of having been entrusted with the goods, avail, if they were originally obtained with a felonious intention. *ibid. f. 10*
- 3 Nor will the obtaining a felonious entrance into a house upon pretence of business evade the guilt of burglary. *161. f. 5*
- 4 So also, in libels, no artful method of appearing to conceal the intended defamation, by initial letters, &c. shall evade the punishment. *353. f. 5*
- 5 So also if *A.* tell *B.* that he will give him a pot of ale to strike him; and thereupon *A.* kills *B.*—this shall not evade the guilt of murder; if it appears to have been designed. *123. f. 24*
- 6 In like manner if on a challenge *A.* refuses to meet *B.* but tells him he shall go next day to such a place, and they there meet and fight, this shall not evade the law, if death ensues. *f. 25*

EVIDENCE.—*Vide Witness.*

- 1 Opening the evidence to the jury, in favour of one of the parties, is said to be a species of maintenance. *536 f. 6*
- 2 In *se defendendo*, and manslaughter, the special matter shall be given in evidence on the general issue. *105 f. 3*
- 3 So also in homicide by misadventure. *115*
- 4 A borrower shall not be admitted an evidence against an usurer, until he has paid off the whole debt. *533 f. 27*
- 5 But the borrower is a good evidence to prove the repayment of the money, and

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and also the usurious contract. *Page*

533 (N)

6 So he may give evidence, though the money is not repaid, if the question neither affects the debt nor avoids the contract. *ibid.*

7 Where the interest of a witness is doubtful, the objection shall only go to the *credit* of his evidence, and not to his competency. *ibid.*

8 Entrance for *goods* will not support an information for usury, for the loan of *money*. 534

9 To dissuade, or endeavour to dissuade, a person from giving evidence against a person indicted, is a contempt of court. 90 f. 15

10 Refusing to give evidence before the grand jury, concerning a crime, is a contempt of the king's prerogative, for which the court may impose an immediate fine. 91 f. 4

11 What shall be evidence of a person's being a trustee for a turnpike road. 424

12 Upon what evidence convictions for offences against the highway and turnpike acts, shall be made. 440

13 How far the exciseman's book shall be evidence of a person being an ale-house-keeper. 458

E VII.—*Infanty. Discretion.*

1 The period at which the human mind is presumed capable of distinguishing between good and evil. 1 (N) 1

E VII SPIRITS.—*Witchcraft. Charmers. Sorcery.*

E X C I S E.

1 A man may be bound to good behaviour for accusing justices of ignorance of the excise laws. 262 (N) 1

2 The exciseman's book shall be proof of a person's being an alehouse-keeper. 458

3 How retailers of exciseable liquors shall be licensed. 461, &c.

4 How licences shall be granted within the limits of the excise office in London. *Page* 462

5 Commissioners of the excise empowered to mitigate penalties. 463

E X C H A N G E.—*Vide Bills.*

E X C U S E.

1 In homicide it is no excuse for the slayer, that the deceased might have recovered if he had not neglected to take care of himself. 119 f. 10

2 If a person be sick for part of the time contained in an information, on 23 Eliz. c. 1. for 20^l. for every month's absence from church, he shall not be excused on account thereof, if it be proved he was a recusant. 21 f. 10

3 A person in holy orders is not thereby excused from the duties imposed by the highway act. 377 f. 15

4 Making a winding passage through logs laid on a highway, will not excuse from the penalty of the nuisance.

5 It is no excuse from the guilt of defamation, that the person only read the libel in the jest. 356 f. 14

6 In what cases justices are excused for not executing the statute 13 Hen. 4. c. 7. against rioters. 307

7 The stat. 23 Eliz. c. 1. inflicting 20^l. for every month's absence from church, does not excuse the offender from the forfeiture of 12 ^d. given by 1 Eliz. c. 2. for the absence of one Sunday. 20 f. 7.

8 All excuses from the charge of repairing decayed bridges, by reason of privileges of exemption, whether derived from charter or act of parliament, are taken away, 22 Hen. 8. c. 5. 449 f. 18

E X C H E Q U E R.

1 On 2 Ed. 3. against riding armed, the justices ought to record their proceedings,

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ceedings, and *where he proceeds ex officio* certify the same into the *Exchequer*. Page 267

- 2 How far the statute of monopolies extends to the Exchequer. 473

EXCUSABLE HOMICIDE.

- 1 Excusable homicide is either *per infortunium* or *se defendendo*. 111
- 2 *PER INFORTUNIUM* is by misadventure where a man, in doing a lawful act, without an injurious intention, happens to kill another. f. 1
- 3 As where the head of a hatchet flies off and kills. f. 2
- 4 Or where a horse whipped by a third person, runs over a child. f. 3
- 5 Or where a workman, *after proper notice*, flings timber from a house, &c. f. 4
- 6 Or where death ensues from moderate correction, &c. f. 5
- 7 Or where an arrow glances and happens to kill. 112
- 8 Or where death happens in playing at foot ball. f. 7
- 9 Or where one kills another in fighting at *barriers*, by the king's command. f. 8
- 10 Or where the gun of a stranger, attending a game keeper, who is warding off poachers from the ground of a third person, and the gun accidentally goes off and kills one of the poachers, for the duty of the game-keeper will authorize the trespass of the stranger. *ibid.*
- 11 *SE DEFENDENDO* is where one who has no other potable means of saving his life from the force of a sudden attack, kills the person by whom he is reduced to such an inevitable necessity. 113 f. 13
- 12 And he who, on an assault, retreats as far as safety will permit, and then kills his assailant, is judged to act upon unavoidable necessity. f. 14
- 13 So also, if his situation be such, either from the violence of the assault, or from the nature of the place, that he cannot retreat without endangering his life. *ibid.*

- 14 And though he wound the assailant in retreating, yet if he give him no mortal wound, till his further retreat is stopped, it is only *se defendendo*. Page 113 f. 15

- 15 An officer resisted in the execution of his duty, and a private person feloniously attacked on the highway, may justify the killing without giving back at all. f. 16

- 16 And it is *said*, tho' even he who gives another the first blow, *without malice*, and afterwards do what he can to avoid killing him, is not guilty of felony,—*Sed quare*. f. 17

- 17 Homicide *per infortunium* and *se defendendo*, are not felonies; were always bailable by the King's Bench, &c. and never punishable with the loss of life. 114

- 18 They are not bailable by *justices of peace*, but the offenders must be committed till the next assizes. f. 23

- 19 Anciently they might have been *mainprized* by the writ *de odio et atia*, but this is obsolete. 114, 115

- 20 These offences cannot be justified by special pleading, but the special matter may be given in evidence on *Not Guilty*. f. 25

- 21 If the offender be acquitted of the indictment, or found not guilty on a special verdict, he shall be discharged upon bail, and forfeit his goods. *ibid.*

- 22 But that by removing the record by *centisurari*, into Chaucery, he shall be pardoned of course, without waiting for the king's warrant. *ibid.*

EXCOMMUNICATION.

- 1 By the common law, an excommunicated heretic may be imprisoned by the writ *excommunicato capiendo*. 7. f. 11

- 2 By 5 & 6 Edw. 6. c. 4. whoever shall smite, or lay violent hands upon another in a church or church yard shall *ipso facto* be deemed excommunicate. 271. f. 25

- 3 And whoever shall maliciously strike another with any weapon in a church or church yard, or draw the same

with

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- with intent *so* to strike, shall, on conviction as the statute directs, have one of his ears cut off, and stand *ipso facto* excommunicated. *Page 272 l. 26*
- 4 But notwithstanding the words *ipso facto*, there must be either a precedent conviction at law, transmitted to the ordinary, or else the excommunication must be declared in the spiritual court, on *proof of the offence* there. *272*
- 5 By 3 Jac. 1. c. 1. every popish recusant convict shall stand disabled, &c. as persons excommunicated, to all intents and purposes. *32 f. 1*
- 6 But they cannot be apprehended upon *excommunicato capiends*. *33 f. 6*
- 7 Excommunication must always appear judicially, otherwise there can be no absolution. *272*

EXECUTION.

- 1 On the conviction of an infant, within the years of discretion, for a capital offence, the judges will, in discretion, respite the execution in order to procure a pardon. *3 f. 8*
- 2 If the Common Pleas, on an appeal of death, or justices of the peace on an indictment of treason, award execution, and the execution is accordingly done, the judges who award, and the officer who executes, are guilty of felony. *105 f. 5*
- 3 But in trespass, if the justices of peace arraign for felony, and award execution, the justice only, and not the officer, is guilty. *120*
- 4 Execution must be done by the lawful officer. *f. 7*
- 5 If a private person do execution, or if the proper officer himself do it without lawful command, it is felony. *f. 9*
- 6 The execution must be pursuant of, and warranted by the judgment; therefore it a sheriff behead a man where that is no part of the sentence, he is guilty of felony. *f. 10*
- 7 The king cannot *carry* the execution, so as to aggravate the punishment. *(N) 1*

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- 8 How homicide, in execution of public justice, is justified. *Page 105*
- 9 If a convict becomes *non compos* after conviction, he shall not be executed. *2 f. 3*

EXEMPTION.

- 1 Persons in holy orders are not exempted from contributing to the repair of the highway, in respect of their spiritual possessions.
- 2 Carriages employed in husbandry are exempted from being weighed at the engines on turnpike roads. *430 f. 21*
- 3 What other kind of carriages are exempted from the payment of tolls on turnpike roads. *434, 435*

EXERCISE.

- 1 To exercise the jurisdiction of a suffragan, without the appointment of the bishop of the diocese, is *præmunire*. *80 f. 21*

EXERCISING a TRADE.—*Vide Apprenticeship. Trade.*

EXILE.—*Vide Transportation.*

EX OFFICIO.—*Affrays. Riding Armed.*

EXPORTATION.—*Vide Smuggling.*

- 1 By some old statutes the exportation of wool was made felony. *195*
- 2 By 7 & 8 Will. 3. c. 28. it is reduced to a misdemeanor. *ibid.*
- 3 By 8 Eliz. c. 3. no person shall export rams, sheep, or lambs, alive, on pain, their aiders, &c. of forfeiture of goods, imprisonment for a year, loss of land, &c. for the first offence. For the second the offender shall be guilty of felony. *f. 2*

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A TABLE OF PRINCIPAL MATTERS.

- 4 By 12 Car. 2. c. 32. whoever shall export any sheep or wool, or load the same, &c. for such purpose, shall forfeit the goods, and 20*s.* for every sheep, and 3*s.* for every pound of wool. Page 195 f. 3
- 5 How the owners of the ship, the matters and mariners, and the merchant, shall be punished. *ibid.*
- 6 By 9 & 10 Will. 3. c. 40. prosecutions may be commenced by the informed within one, and by the crown within three years. 195, 196
- 7 By 7 & 8 Will. 3. c. 28. whoever shall aid in the exportation of wool shall suffer three years imprisonment, and pay treble the value, the inhabitants, &c. are liable to, &c. 196 f. 4
- 8 By 4 Geo. 1. c. 11. whoever shall be in prison for the exportation of wool, or for aiding therein, and shall refuse to plead to the prosecution within one term, judgment shall be entered; and in case the penalty be not paid in three months, the offender shall be transported. f. 5
- 9 By 12 Geo. 2. c. 21. whoever shall bribe, or offer, or promise so to do, to any revenue officer, to connive at the transportation or concealment of wool, shall forfeit 300*l.* f. 6
- 10 And if any officer, or his assistant, shall be obstructed in seizing any wool, the offender, their officers, or any other person, being armed and *d. f. u. p. d.*
- 11 who shall attempt to rescue any wool, seized by such officers, shall be transported for seven years. f. 6
- 11 By 19 Geo. 2. c. 34. if any person, armed, to the number of three, shall be enabled to assist in the illegal exportation of wool, or shall refuse, &c. or if any person shall have his face disguised, when passing with such goods, or shall obstruct the seizing, &c. he shall be guilty of felony without clergy. 196, 197
- 12 Formerly the exportation of *all coin and bullion* was prohibited. 72 f. 6
- 13 By 15 Car. 2. c. 7. any person may export any *foreign coin* or bullion. *ibid.*
- 14 But by 6 & 7 Will. 3. c. 17. whoever shall make ingots of silver, in imitation of the Spanish, shall forfeit 500*l.* Page 72 f. 7
- 15 And no person shall export any molten silver, unless stamped at *Goldsmith's Hall*, under a certificate, that oath was made by the owner and one witness, that the same is lawful silver, and that no part thereof was the coin, or clipping thereof, or the plate of the kingdom. 72, 73
- 16 Officers are authorized to seize all silver without such mark and certificate. 73 f. 8
- 17 If any broker, not a goldsmith or refiner, shall buy or sell any bullion, or molten silver, he shall be imprisoned six months. 73 f. 9
- 18 The owner shall prove the bullion to be foreign if a doubt arise. f. 10
- 19 No bullion to be entered or shipped, but in the name of the true owner, proprietor, or importer, on pain of forfeiture. *ibid.*
- 20 By 7 & 8 Will. 3. c. 19. no person shall ship any bullion or molten silver whatsoever, unless on a certificate from the Lord Mayor and Aldermen of the city of London, of oath having been made before the court as aforesaid. (*Vide Supra*, No.) f. 11
- 21 the said court shall certify the same *circumstantially* to the commissioners of the customs before any coquet, &c. shall be granted. *ibid.*
- 22 The penalties on the owner, captain, and coquet officer, for acting contrary this act. *ibid.*
- 23 For the acts relating to the exportation of corn. 486 (N) 1
- 24 By 2 Geo. 3. c. 14. whoever shall cause any ale or beer, exported as merchandise, to be unshipped, or re-landed, &c. they shall forfeit the same, and 50*l.* for every cask. 513 f. 84
- 25 For the exportation of beef and pork. 520

EXPOSITION,

- 1 It is a general rule, that in doubtful cases, the reason of the common law ought

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- ought to govern the construction of a statute. *Page 58 f. 39*
- 2 An affirmative statute saving a particular jurisdiction, shall be so construed as not to abridge the powers of the jurisdiction saved. *14 f. 4.*
- 3 An affirmative subsequent statute shall be construed concurrent with a former statute, with which it is consistent. *26*
- 4 In what cases the meaning of a statute shall controul the words. *201*
- 5 Where a statute shall be construed by equity. *278*
- 6 Where a statute begins by naming inferior persons, it shall not be taken to extend to superiors. *177 f. 4*
- 7 Where a statute expresses what the law would have implied, the words of the statute shall not operate. *20 f. 8. 33*
- 3 A statute taking away clergy from an offence, alters not the nature of it. *112. 151*
- 9 Statutes for the preservation of the public peace, shall be construed liberally. *299*

Vide Statute, Piracy, Indictment, Preamble.

EXTOL.

- 1 By 5 Eliz. c. 1. advisedly and wittingly to extol and set forth the jurisdiction of the Pope is *pramanire*. *67*

EXTORTION.

- 1 Is any oppression, but especially an officer obtaining money colourably, where none or not so much is due, or where it is not yet due. *316. c. 68*
- 2 No fees shall be taken but of the king, by any officer concerned in the administration or execution of justice, &c. *f. 2*
- 3 A prescription by a clerk of the market claiming fees for the view of weights and measures is void. *ibid.*
- 4 The danger of oppression from officers ancient fees, as the bar fee

by a sheriff, &c. which they claimed, and an enumeration of the statutes by which their fees are now settled. *316; Page 317 (N) 1*

- 5 Officers guilty of extortion who take other fees than they are allowed. *ibid. f. 4*
- 6 A promise to pay them more than they are intitled to take is void. *ibid.*
- 7 It is extortion to oblige an executor to prove a will twice over, and to take fees thereon; or to procure a gratuity to become bail for a prisoner; or to arrest a man and procure a release; or to obtain money from a prisoner by any colour of office. *ibid. (N) 2*
- 8 It is extortion for a miller to take more than is due by custom; or for a commissary to take more than his right for absolution; or a ferryman for ferrying; or to force an exorbitant price for places at a fair; or in an under sheriff to refuse execution of process without his fees; or to take a bond for them, or for a coroner to refuse a view. *ibid.*
- 9 Extortion, by the common law, is punishable with deprivation, fine, and imprisonment. And by the statute of Westminster, the offender shall yield twice as much as he takes. *318*
- 10 The indictment or information must state the fact particularly. *ibid. (N) 3*
- 11 The sessions may try the indictment. *ibid.*
- 12 An action lies for the double value. *ibid.*
- 13 Defects cured by verdict, and the party will be forced to demur. *ibid.*
- 14 Proof of the smallest possible taking is sufficient; for it is the taking and not the contract which constitutes the crime. *ibid.*
- 15 Aiders are principals, and the offence may be laid in any county. *ibid.*

EXTRA WEIGHT.

- 1 What additional toll shall be paid for extra weight on turnpike roads. *479*

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E Y R E.

- 1 By the 25 Edw. 3. c. 2. it is high treason to slay the justices *in eyre* or justices of assize assigned to hear, &c. being in their places during their offices. *Page 61*
- 2 But not attempt to kill them, or the actual wounding unless death ensue, will amount to this crime. *ibid.*

F.

FACE BLACKED.—*Vide Smuggling.*

F A I R S.

- 1 **B**Y 5 & 6 Edw. 6. c. 25. & 26 Geo. 2. c. 31. no person, except in fairs, shall keep an unlicensed alehouse. *455. f. 11*
- 2 Those who brew ale in fairs must give notice to the gaugers that it may be surveyed. *ibid. (N)*
- 3 This indulgence only extends to the place where the common fair is held. *ibid.*
- 4 By 5 & 6 Edw. 6. c. 9. to break open a booth or tent in any market or fair, the owner, his wife, &c. being therein, is felony without clergy.
- 5 By 27 Hen. 6. c. 5. no fair shall be held on the principal festivals, Good Friday, or any Sunday, except the fairs in harvest. *4*

FALL.—*Vide E adand.—Homicide.*

FALSE DICE.—*Vide Dice.—Cheats.*

FALSE TOKENS.—*Vide Cheats. Deceit.*

- 1 By 33 Hen. 8. c. 1. falsely to obtain the property of another by means of any privy false token is a misdemeanor. *344*

- 2 What shall be considered a privy false token. *Page 345. (N) 2*

FALSE MONEY.—*Vide Coin.*

F A L S E N E W S.

- 1 Spreading false news is an indictable offence. *92 f. 4*

FALSE OATH.—*Vide Perjury.*

F A M E

- 1 By 34 Edw. 3. c. 1. justices of peace are empowered to restrain and to take (*inter alia*) of all them that be *not of good fame* sufficient surety for their good behaviour. *261*
- 2 It has been thought that this means only such as are *defamed* and justly suspected of an intention to break the peace. *f. 2*
- 3 But evil fame as properly includes persons of scandalous behaviour in other respects as those who give suspicion of their readiness to break the peace. *ibid.*
- 4 Therefore for those causes of scandal which give a man a *bad fame*, as being *contra bene mores* only, may be bound to his good behaviour. *ibid.*
- 5 And also all persons whose misbehaviour may reasonably be intended to bring them within the meaning of persons of *evil fame*, the great latitude of which leaves it to the judgment of the magistrate. *262*
- 6 A libel is any malicious defamation, expressed in any manner so as to be generally understood. *352. c. 73*

FARTHING.—*Vide Half-penny.*

- 1 It is not high treason to coin or counterfeit brass farthings. *62. f. 57*
- 2 By 15 Geo. 2. c. 28. whoever shall coin or counterfeit any brass or copper money called a half penny or farthing.

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thing, their aiders, &c. shall suffer 2 years imprisonment, and find surety for two years more. *Page 71, 72*

3 By 11 Geo. 3. c. 40. whoever shall coin or counterfeit a half-penny or a farthing, his aiders, &c. shall be guilty of felony. *72. f. 5*

4 Whoever shall buy, sell, take, receive or put off any counterfeit copper money not cut in pieces for lower than its nominal value shall be guilty of felony. *ibid.*

5 The houses of such counterfeiters may be searched. *ibid.*

6 Whoever shall alter (in the way mentioned) a farthing, with intent to make it *resemble* a sixpence, his aider, &c. shall be guilty of high treason. *65*

F A S T D A Y S.

1 By 2 & 3 Edw. 6. c. 19. & 5 Eliz. c. 5. it is made penal to affirm that any eating of fish or forbearing of flesh mentioned therein is necessary to salvation that it is the service of God. *13. f. 7*

2 By 27 Hen. 6. c. 5. no fair or market shall be held on the principal fast days, except the fair Sunday in horse-vest, on pain of forfeiting the goods exposed to sale. *11*

F E E S.—*Vide Extortion.*

1 By 26 Geo. 2. c. 14. & 27 Geo. 2. c. 16. the fees of justices clerks are regulated.

2 By 23 Geo. 2. c. 20. f. 10. the fees of sheriffs out of the exchequer are regulated.

3 By 3 Geo. 1. c. 13. f. 16. certain fees of sheriffs are settled.

FEE SIMPLE and FEE TAIL.—

Forgery by 5 Eliz.

1 The recusant heir of a recusant ancestor has no remedy but by conforming to free his fee simple lands from tall extortions incurred by his ancestor's conviction, whether the lands

were seized in the ancestor's life-time or not. *Page 30. f. 56*

2 But the fee-tail lands which the heir claims from the ancestor is not chargeable after his death on any conviction by proclamation, &c. *f. 57*

3 Lands entailed are not within the statute of *præmunire* after the death of the offender. *85. f. 48*

FEAR.—*Vide Robbery.*

1 Larceny from the person by putting in fear is called robbery. *147*

2 Money delivered in consequence of an oath, compelled by fear is robbery. *ibid. f. 1*

3 Fear is the distinguishing ingredient between robbery and other larcenies. *ibid. (N) 3*

4 Therefore if the fear be exerted subsequent to the taking, it is larceny, but not robbery. *ibid.*

5 So where no fear is impressed for the purpose of obtaining the property. *ibid.*

6 But it is not necessary that the fact of actual fear should either be laid in the indictment or proved upon the trial. *149 (N) 4*

7 Proof of such acts as may reasonably be supposed to excite fear and apprehension in the human mind are sufficient, if the party parts with his money under the influence of them. *ibid.*

8 Fear in *action fustians* is the law will presume fear where there appears a just ground for it. *ibid.*

9 How fear is properly expressed in an indictment. *150*

F E L O N Y.

1 Capital offences, by the common law, come generally under the title of felony; which signifies *qualiter crimen facit animum perpetuum*. *99. c. 25*

2 It can be expressed by no *periphrasis* without the word *felony*. *ibid. 1. 1 Tit 3 3 felony*

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- 3 Felony is included in high treason; and a pardon of felony pardons treason, if the word *proditur* be omitted. Page 99 f. 2
- 4 It is always accompanied with an evil intention. f. 3
- 5 It shall not be imputed to a mere mistake or mis-advertisement. *ibid.*
- 6 Anciently the bare *intention* to commit felony was considered as felonious. *ibid.*
- 7 But now felony shall not be imputed to a bare intention to commit it. *ibid.*
- 8 But the party may be very severely fined for such an intention. *ibid.*
- 9 Felony in general signifies every species of crime which occasioned at common law the forfeiture of land or goods. *ibid.* (N)
- 10 All offences, now capital, are in some degree or other, felony. *ibid.*
- 11 But offences may be felonies, without being capitally punished. *ibid.*
- 12 The true definition of felony is "an offence which occasions a total forfeiture of lands or goods or both at the common law and to which capital or other punishment *may* be super-added according to the degree of guilt." *ibid.*
- 13 Capital punishment may be inflicted and yet the offence be no felony. *ibid.*
- 14 The true criterion of felony is forfeiture. *ibid.*
- 15 But by common usage of the law the term felony is inseparably applied to capital punishments. *ibid.*
- 16 Therefore if a statute make an offence felony, the law implies that it shall be punished with death and forfeiture. *ibid.*
- 17 Where a statute decrees an offence to undergo judgment of life and member, the offence becomes a felony though that word be omitted. 168. f. 1
- 18 But felony shall not be implied from any doubtful or ambiguous words in a statute. *ibid.* f. 2
- 19 Therefore if a statute only prohibit under pain of forfeiture, &c. the offence shall be considered a misdemeanour only. f. 3
- 20 Where a statute makes a second offence felony or subject to a heavier punishment than the first, it must be after conviction. Page 168, 169
- 21 What shall be incidentally implied in every statute which makes an offence felony. 169. f. 4 & 5
- 22 If one commit an offence made felony by statute, and the statute be repealed he cannot be punished for the felony. f. 6
- 23 For misprision of felony. 251

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Affault.

- 1 Assaulting persons with intent to tear or spoil their clothes, 6 Geo. 1. c. 23. f. 11. 253

Bridges.

- 2 Destroying Walton bridge, 20 Geo. 2. c. 22. Hampton Court bridge, 23 Geo. 2. c. 37. f. 12. Ribble bridge, 24 Geo. 2. c. 36. f. 34. Sandwich bridge, 23 Geo. 2. c. 55. Wye bridge, 29 Geo. 2. c. 73. Black Friars bridge, 29 Geo. 2. c. 86. Jeremy Ferry's bridge, 30 Geo. 2. c. 59. Old Brentford bridge, 30 Geo. 2. c. 63. f. 19. 31 Geo. 2. c. 46. Trent bridge, 31 Geo. 2. c. 59. 193, 194

Bail.

- 3 Personating bail before commissioners in the country, 4 W. & M. c. 4. f. 2. 178. f. 9. 179. f. 11

Common.

- 4 Destroying fences set up for inclosing common or waste land, by act of parliament, 9 Geo. 3. c. 29. f. 3. 192 f. 4

Copper.

- 5 Removing copper, brass, &c. from any dwelling house, &c. with intent to steal; assailing, or buying such goods, knowing them to be stolen, 21 Geo. 3. c. 63. 218 f. 14

Corn.

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Corn.

6 Destroying granaries, the second offence, 11 Geo. 2. c. 22. Page 143

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Person deemed smuggler according to the description of 9 Geo. 2. c. 35. f. 13. *ibid.*
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Cutting them in marshland, 22 H. 8. c. 11. 2 & 3 Ph. & M. c. 19. 198

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19 Receiving jewels and plate, knowing them to have been stolen, 10 Geo. 3. c. 48. 235 f. 9

Iron Bars.

20 Stealing them, fixed to buildings, 4 Geo. 2. c. 32. 218 f. 13

King.

21 Conspiring, or imagining to destroy him, or any of his council, 3 H. 7. c. 14. 74 f. 13

Labourers.

22 Confederacies of masons to prevent the Statutes of labourers, 3 H. 6. c. 1.

Lead.

23 Entering mines of black lead with intent to steal, 25 Geo. 2. c. 10. f. 1. 278 f. 12

24 Stealing it fixed to building, 4 Geo. 2. c. 32. 218 f. 13

25 Receiving of lead so stolen, *id.* f. 3.
26 Buying or receiving lead, iron, copper, &c. knowing it to be stolen, 29 Geo. 2. c. 30. 232 f. 2

Leeks.

27 Persons guilty of demolishing them, or of sluices or floodgate, 1 Geo. 7. f. 2. c. 19. 199 f. 2.

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28 And after cutting out tongue, or putting out eyes, 5 H. 4. c. 5. 176 f. 7

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29 Solemnizing it clandestinely, 26 Geo. 2. c. 33. f. 8. 173 f. 11

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31 Blanching copper or putting off counterfeit money, 8 & 9 W. 3. c. 26. f. 6. 71. f. 2
32 Counterfeiting copper halfpence or farthings, 11 Geo. 3. c. 40. f. 1. 72. f. 5
33 Receiving or paying counterfeit copper money, *ibid.*

Mutiny.

- 34 In mariners hindering commander from fighting, 22 & 23 Car. 2. c. 11. f. 9. 185. f. 10
35 Soldier or soldier upon or beyond the sea, mutiny, disobeying or leading superior, 2 & 3 Ann. c. 20. f. 35.

Palmers.

- 36 Entering into King's house, with intent to Rob, 33 H. 8. c. 12. f. 27.

Pewter.

- 37 Buying or receiving pewter pots, or other pewter, knowing them to be stolen, 21 Geo. 3. c. 69. 235. f. 10

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- 38 Frauds respecting the postage of letters, 5 Geo. 3. c. 25. f. 19. 7 Geo. 3. c. 50. f. 3. 140

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- 39 Assisting one committed for treason or felony (except petty larceny) to attempt an escape, 16 Geo. 2. c. 31. 141

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- 40 Persons infected with it going abroad, 1 Jac. 1. c. 31. f. 7. 241

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11 Before the fact in burglary, shoplifting, &c. 3 & 4 W. & M. c. 9. 151
12 Before the fact in robberies in shops, warehouses, coach-houses or stables, 10 & 11 W. 3. c. 23. *ibid.*
13 Before the fact in piracy, in some cases, 11 & 12 W. 3. c. 7. 8 Geo. 1. c. 24. 156
14 To forging any deed, will, bond, bill of exchange, note, indorsement or assignment of bill or note, or any acquittance or receipt, 2 Geo. 2. c. 25. 210. f. 10
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24 Not surrendering, or not submitting
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- 93 Sending them, or rescuing such offenders, 27 Geo. 2. c. 15. 225
- Linen.*
- 94 Stealing it from bleaching grounds, 4 Geo. 2. c. 16. 18 Geo. 2. c. 27. 146
- 95 Break-

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- 95 Breaking into shop, &c. to steal or destroy linen yarn or implements, 4 Geo. 3. c. 37. *Page 239 f. 2*
96 Or to cut or destroy linen or cotton, 22 Geo. 3. c. 40. f. 2. 240 f. 3

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- 97 Any person maliciously lying in wait, 22 & 23 Car. 2. c. 1. 176 f. 4

Marshes.

- 98 Firing engines for draining them, the second offence, 11 Geo. 3. c. 34. 14 Geo. 2. c. 24. 21 Geo. 3. c. 18. 100 f. 8

Mariners.

- 99 Wandering without testimonial of justices, 39 El. c. 17. f. 2. 183
100 Departing within the year from the service of those who took them to save them from execution, 39 El. c. 17. f. 4. 184

Mills.

- 101 Riotous assembling and destroying Mills, 9 Geo. 3. c. 29. f. 1, 2. 309 f. 60

Money.

- 102 Uttering false monies the third time, 15 Geo. 2. c. 28. f. 2, 3. 71 f. 4

Murder.

- 103 By 12 H. 7. c. 7. 23 H. 8. c. 1. 25 H. 8. c. 3. 28 H. 8. c. 1. 1 Ed. 6. c. 12. 117

Mute.

- 104 Standing mute, or not answering directly, 25 H. 8. c. 3. 1 Ed. 6. c. 12. 4 & 5 Ph. & M. c. 4. 3 & 4 W. & M. c. 9. 1 Ann. c. 9.
105 Persons arraigned for felony or piracy, and standing mute, shall be convicted, 12 Geo. 3. c. 20. 3 (N) 6

FELONIES WITHOUT CLERGY CONTINUED.

Outlawry.

- 106 For offences not within the benefit of clergy, 1 Ed. 6. c. 12. 4 & 5 Ph. & M. c. 4. 8 El. c. 4. 18 El. c. 7. 22 Car. 2. c. 5. 3 & 4 W. & M. c. 9.

Perjury.

- 107 Persons convicted of wilful and corrupt perjury, escaping, breaking prison, or returning from transportation, 2 Geo. 2. c. 25. f. 2. P. 328

Pick-pocket.

- 108 Taking clam & secret from the person above the value of 12d. 8 El. c. 4. 130

Piracy.

- 109 By 11 & 12 W. 3. c. 7. 4 Geo. 1. c. 12. 8 Geo. 1. c. 24. = 152 & 7
110 Person laying violent hands on his commander, to hinder him from fighting, &c. to suffer as pirate, 11 & 12 W. 3. c. 7. f. 9. *ibid.*
111 Trading with pirates, 8 Geo. 1. c. 24. 156 f. 17

Plate.

- 112 Fraudulent marking of plate or counterfeiting the stamp, made felony without clergy, by 31 Geo. 2. c. 32. f. 15. altered to transportation. 13 Geo. 3. c. 59. 208

Prisoning.

- 113 Of malice prepenfed. 1 Jd. 6. c. 12. f. 13.

Papish Recusants.

- 114 Refusing to abjure, or not departing the realm within a time limited, or returning without the king's leave, 35 El. c. 1. f. 3. and c. 2. f. 10.

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Priests and Jesuits.

- 115 They who receive, relieve, or maintain them knowingly, 27 El. c. 2. f. 4. *Page 76*

Prisoners.

- 116 Taking the benefit of insolvent acts and forswearing themselves, 28 Geo. 2. c. 13. f. 17. 1 Geo. 3. c. 17. f. 26. 204 f. 4
117 Refusing to deliver up their effects, or concealing to the value of 20*l.* 28 Geo. 2. c. 13. f. 39. 1 Geo. 3. c. 17. f. 46. *ibid.*
118 Persons transported for assisting prisoners to escape, and returning, 16 Geo. 2. c. 31. Escaping a second time from confinement, to hard labour in lieu of transportation, 16 Geo. 3. c. 13. f. 15. 245

Privy Councillors.

- 119 They who attempt to kill, or do strike or wound them in the execution of their office, 9 Ann. c. 16. 74 f. 14

Proctors.

- 120 Persons disguised abetting rioters who oppose the execution of process in a pleaded privileged place, 9 Geo. 1. c. 28. f. 3. Bk. 2

Quarantine.

- 121 Not performing it, 7 Geo. 1. c. 3. 8 Geo. 1. c. 8. 1 Geo. 2. c. 15. 6 Geo. 2. c. 34. 26 Geo. 2. c. 6. 241 app. 11
122 Master of ship offending against directions of 26 Geo. 2. c. 6. f. 2. 241
123 Concealing the having infected persons on board, 28 Geo. 2. c. 6. f. 2. 242
124 Refusing to perform quarantine, 26 Geo. 2. c. 6. f. 8. 242
125 Sound persons entering lazaret, and escaping before they have per-

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formed quarantine, 26 Geo. 2. c. 6. f. 10. *Page 242*

- 126 Superintendent of quarantine neglecting duty, 26 Geo. 2. c. 6. f. 17. *ibid.*
127 Concealing or clandestinely conveying letters or goods, 26 Geo. 2. c. 6. f. 18. *ibid.*

Rape.

- 128 Carnally knowing woman child under the age of ten years, 18 El. c. 7. f. 4. 170 f. 4

Rescue.

- 129 Rescuing convicts from transportation, 6 Geo. 1. c. 23. f. 5.
130 Rescuing any person committed for, or found guilty of murder, or going to execution, or during execution, 25 Geo. 2. c. 37. f. 9. Bk. 2
131 Persons transported for rescuing the body of such offenders, after execution from the sheriff or surgeon, &c. and returning, 25 Geo. 2. c. 27. f. 10. *ibid.*

Rebels.

- 132 Pardoned and returning from transportation, or going into the dominion of France or Spain, 20 Geo. 2. c. 46. f. 1. 244 app. 13
133 Persons aiding them to such purposes, 2 Geo. 20. c. 46. f. 2.
134 Or holding correspondence with them, or with persons employed by them, by letters or otherwise, 20 Geo. c. 46. f. 3.

Recognizance.

- 135 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 178 f. 9.

Recovery.

- 136 Acknowledging it in the name of another, 21 Ja. 1. c. 26. *ibid.*
Rioters.

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Rioters.

- *136 Assembled to the number of twelve and continuing together one hour after proclamation, 1 Geo. 1. fl. 2. c. 5, f. 1. *Page 308*
137 Pulling down buildings, 1 Geo. 1. fl. 2. c. 5, f. 4. 308 f. 56
138 Or hindering proclamation being made, 1 Geo. 1. fl. 2. c. 5, f. 5. *ibid.*

Robbery.

- 139 Of churches, or sacrilege, 23 H. 8. c. 1. 25 H. 8. c. 3. 3 Ed. 6. c. 12. 5 & 6 Ed. 6. c. 9 & 10. 151
140 In or near the highway, 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Ed. 6. c. 12. 150
141 In booths or tents in any fair or market, 5 & 6 Ed. 6. c. 9. 151
142 In dwelling houses, shops, warehouses, coach houses, or stables, 23 H. 8. c. 1. 25 H. 8. c. 3. 1 Ed. 6. c. 12. 5 & 6 Ed. 6. c. 9 & 10. 39 El. c. 15. 3 & 4 W. & M. c. 9. 10 & 11 W. 3. c. 23. 12 Ann. c. 7. *ibid.*
143 On board any vessel, or on any wharf, to the value of 40s. 24 Geo. 2. c. 45. 146
144 Stealing furniture, &c. from lodgings (if above 12 d. value) 3 & 4 W. & M. c. 9. f. 5. 137. f. 10
145 Stealing exchequer orders, tallies or other orders intitling person to annuity or share in any parliamentary fund, or exchequer bills, bank notes, South Sea bonds, East India bonds, dividend warrants of bank, South Sea, East India, or other company, bills of exchange, navy bills, or debentures, goldsmiths notes, or other bonds or warrants, bills or promissory notes, &c. is felony the same as if the money secured by such bonds, &c. had been stolen, 2 Geo. 2. c. 25. f. 3. *And see 31 Geo. 2. c. 22. f. 81.* 142
146 Offenders ordered to be transported for assault with intent to rob, break-

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ing gaol or escaping, 7 Geo. 2. c. 21. f. 2. *Page 143*

Sacrilege.—See Robbery.

Sheep-stealing.

- 147 By 14 Geo. 2. c. 6. extended to bull, cow, &c. by 15 Geo. 2. c. 34. 180. f. 3

Smuggling.

- 148 By 8 Geo. 1. c. 18. 227. ap. 6
149 Assembling armed for running of goods, 19 Geo. 2. c. 34. f. 1. 227. ap. 6
150 Persons transported for assisting in running goods, and returning, 9 Geo. 2. c. 35. f. 10. *ibid.*
151 Persons convicted of running goods, returning from transportation. 8 Geo. 1. c. 18. f. 6. *ibid.*

Sea.

- 152 Treasons, robberies, felonies, murders, and confederacies, done upon the sea, 28 H. 8. c. 15. f. 3. 152

Seamen.

- 153 Personating them to receive their pay, 31 Geo. 2. c. 10. f. 24. 212. f. 22

Ships.

- 154 Destroying them wilfully, 22 & 23 Car. 2. c. 11. f. 12. 1 Ann. fl. 2. c. 9. 4 Geo. 1. c. 12. 11 Geo. 1. c. 29. 185. 186

Shooting.

- 155 Shooting at another by 9 Geo. 1. c. 22. 225

Soldiers.

- 156 Departing without licence, 7 H. 7. c. 1. 3 H. 8. c. 5. 2 & 3 Ed. 6. c. 2. f. 6. 185. f. 8, 9
157 Wandering without testimonial from justices, 39 El. c. 17. f. 2. 184 158 De-

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FELONIES WITHOUT CLERGY CONTINUED.

- 158 Departing within the year from the service of those who took them to save them from execution, 39 El. c. 17. f. 4. Page 184
159 Inlitting or causing others to inlitt in foreign service, 9 Geo. 2. c. 30. 74. f. 16
160 Accepting commission from the French king.—Continuing in the French service after 29 September 1757.—Contracting to inlitt in foreign service, 29 Geo. 2. c. 17. 75. 75 f. 17

South Sea Company.

- 161 Officer or servant embezzling their effects, 24 Geo. 2. c. 11. f. 3.

Stamps.

- 162 Counterfeiting stamps on calicoes, linens, or stuffs printed in Great Britain, 13 Geo. 3. c. 56. printed cottons, 14 Geo. 3. c. 72. f. 8. 208
163 On wrought plate, 24 Geo. 3. c. 34. f. 16. 208

Statute.

- 164 Acknowledging it in the name of another, 21 Ja. 1. c. 26. 178. f. 9

Stores.

- 165 Imbezelling them to the value of 20s. or offending against 31 El. c. 4 concerning imbezellment of stores, 21 Car. 2. c. 5. f. 3. 75. f. 18
166 Burning or otherwise destroying ships of war, buildings in dockyard, &c. or military stores, 12 Geo. 3. c. 24. 75. f. 19

Transportation.

- 167 Felons returning within the time, 4 Geo. 1. c. 11. 6 Geo. 1. c. 23. 16 Geo. 2. c. 13. 24 Geo. 3. c. 11. f. 11. 244 to 250

FELONIES WITHOUT CLERGY CONTINUED.

Turnpikes.

- 168 Destroying them, or locks, sluices, or floodgates, or rescuing such offenders, 8 Geo. 2. c. 20. And see 13 Geo. 3. c. 84. f. 42. Page 198 c. 53
169 Destroying toll gates, weighing engines, &c. or rescuing offenders, 13 Geo. 3. c. 84. f. 42. 192. f. 5

Wool and Woollen Manufactures.

- 171 Unlawful exporters returning after transportation, 4 Geo. 1. c. 11. f. 6. 195. c. 52
Opposing officers of customs, ex- in seizing wool, 12 Geo. 2. 26. *ibid.*
Buying woollen goods, or rack, 12 Geo. 1. c. 34. f. 7. See Bk. 2
Entering by force any house with intent to destroy any woollen goods tools used for manufacturing, 22 Geo. 3. c. 40. f. 1. 239

Womens.

- 174 Stealing them, and marrying or debauching them, having lands or goods, or being heirs apparent, 39 El. c. 9. 171
175 After conviction of an offence that was within clergy, ousted of it on conviction of any other felony, 3 & 4 W. & M. c. 9.

Wreck.

- 176 Making holes in ship in distress, or sealing pump, 12 Ann. ft. 2. c. 18. f. 5. 219
177 Plundering shipwrecked goods, or beating, &c. with intent to kill, or otherwise obstructing the escape of any person from such ship, or putting out false lights with intent to bring any ship into danger, 26 Geo. 2. c. 19. 220

FELONIOUS

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FELONIOUS HOMICIDE.—Murder. Manſlaughter.

- 1 There are only two ſpecies of felonious homicide, viz. murder and manſlaughter. Page 115
- 2 Theſe are either with or without malice. *ibid.* c. 30
- 3 That without malice is called manſlaughter, and ſometimes chance medley. *ibid.* f. 1
- 4 This is ſuch a killing as happens upon a ſudden quarrel; or in the commiſſion of an unlawful act, without any deliberate intention of doing miſchief. *ibid.*
- 5 There can be no accessaries to manſlaughter, becauſe it muſt be done without premeditation. 115
- 6 Felonious homicide, with malice, is either murder or petit treaſon. 117 c. 31

FELO DE SE.

- 1 Homicide may be againſt a man's own life. 102 c. 27
- 2 To commit the crime of *ſelf-murder*, the offender muſt be of the age of diſcretion, and *compos mentis*. 102 f. 1
- 3 The common concluſion that a *ſelf-murderer* muſt *ipſo facto* be *non compos mentis*, as being contrary to nature and all ſenſe and reaſon, is abſurd. f. 2
- 4 Its repugnancy to the duties of humanity rather aggravates, than excuſates the offence. f. 3
- 5 The murder of a child or parent is as much againſt reaſon and nature. *ibid.*
- 6 The abhorrence of the law reſpecting this crime. 102, 103
- 7 One who maliciously attempts the death of another, and in purſuance thereof, unwillingly kills himſelf, is *ſelo de ſe*. 103
- 8 Wherever death is cauſed by an act done with a murderous intent, it makes the offender a murderer. *ibid.*
- 9 This rule illuſtrated. *ibid.* f. 5
- 10 To kill another by deſire, is murder, and the perſon killed is not *ſelo de ſe*. f. 6

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- 11 But where two perſons take poiſon, and one ſurvive, he who purchaſed the poiſon is not a murderer, though the one who dies is a *ſelo de ſe*. P. 103 f. 6
 - 12 A *ſelo de ſe* ſhall forfeit all chattels, real or perſonal, on his own right; all chattels poſſeſſed jointly with his wife or in her right; and all bonds, &c. perſonal things in action which belong to himſelf—and perhaps entire chattels in poſſeſſion to which he is jointly entitled with another, *except merchandize*, but he ſhall forfeit only a moiety of joint chattels which may be ſeized, and nothing as executor or adminiſtrator. f. 7
 - 13 The blood of a *ſelo de ſe* is not corrupted, nor his lands of inheritance forfeited; nor his wife barred of dower. f. 8
 - 14 No part of the perſonal eſtate is veſted in the king before inquiſition found. 104. f. 9
 - 15 But after inquiſition, the forfeiture relates back to the time the wound was given. f. 10
 - 16 Inquiſition ought to be *ſuper viſum corporis* which cannot be traversed. f. 11
 - 17 If the body cannot be found, juſtices of peace or the king's bench, if in the county where it lies, may take in-quiſition, and this inquiſition may be traversed. f. 12
 - 18 How ſuch inquiſitions ought to ſtate the facts. 13, 14
 - 19 They are in the nature of indiſc-ments. *ibid.*
 - 20 If they be full in ſubſtance, defect of form may be amended. f. 15
- Vide Coroner. Corruption of Blood. Dower. Forfeiture. Inquiſition. Par-don. Year and Day.*

FEME COVERT.

- 1 A feme covert, favoured in reſpect of her huſband's authority over her, ſhall not be puniſhed for committing a bare theft in company with or by coercion of her huſband. 3, 4
 - 2 This exemption extends to burglary and perhaps to robbery. 4 (N) 8
- U a 3 A feme

A TABLE OF PRINCIPAL MATTERS,

3 A feme covert shall not be deemed an accessory to a felony for receiving her husband who has been guilty of it.

Page 4. f. 10

4 Nor shall she be deemed a principal for such reception, if the husband has been guilty of treason. (N) 9

5 Neither is she affected by receiving, jointly with her husband, any other offender. *ibid.*

6 She cannot be admitted as a witness even *collaterally* to discover her husband's guilt. *ibid.*

7 But if a *feme covert* commit a theft of her own voluntary act, or by the bare command of her husband (*quere*) or be guilty of treason, murder, or (*quere*) robbery, in company with or by coercion of her husband she is punishable. 4. f. 11

8 Or if she receive stolen goods without her husband's privity, or if he, knowing it, disclaims her, she may be punished as accessory, *ibid.* (N) 10

9 A wife may be indicted together and condemned to the pillory with her husband for keeping a bawdy house

4. f. 12

10 Therefore an action will lie for saying she keeps a bawdy house. 357 (N) 1

11 Generally a feme covert shall answer for any offence not capital. 4. f. 13

12 If the offence be of a nature which she may commit alone, the husband need not be joined in the indictment, provided he is no way privy. *ibid.*

13 If a woman bring a false appeal of death, she shall be imprisoned alone.

4. 5

14 But for a forfeiture, the husband may be made liable, by joining him in the prosecution. 5

15 Several offences for which a woman may be indicted alone, enumerated.

5 (N) 11

16 A *feme covert* is within the 1 & 23 of Eliz. imposing penalties on absence from church; and an information lies against the husband. 22: f. 11 (N)

17 It is very doubtful whether the conviction of a *feme covert* upon an indictment can be pleaded to an information against her and her husband. 27

18 The husband is not liable to pay a forfeiture recovered against his wife upon an indictment. Page 27

FENCES.

1 The offence of levying dykes by approvers. 191, c. 50

2 By 6 Geo. 1. c. 16. to destroy fences round woods or plantations, is three months correction and the parish liable to the damage. 192. f. 2

3 By 16 Geo. 3. c. 30. to destroy the fences of deer parks, is transportation. *ibid.* f. 3

4 By 9 Geo. 3. c. 29, to destroy fences of waste lands inclosed, transportation. *ibid.* f. 4

5 By 4 Geo. 2. c. 32. to break with intent to steal any lead, iron bar, palisade, or rail fixed to a dwelling house or its appurtenances or any other buildings, transportation. 218. f. 13

6 A church is within the words of this act. *ibid.* (N) 1

FERÆ NATURÆ.

1 Larceny may be committed of animals *feræ naturæ* if they be fit for food and reduced to tameness; and known by the offender to be so. 144. f. 26

2 But otherwise, larceny cannot be committed of them, because animals *feræ naturæ* are goods whereof no particular person has a property. 143. f. 22

FERM.—*Vide* Burning.

1 By 4 & 5 W. & M. c. 23. (for preserving the red and black game) no persons shall burn on the mountains, &c. any fern, &c. between 2d. Feb. and 24th. June, on pain of imprisonment. 224 (N)

2 By 28 Geo. 2. c. 19. (for preserving deer and game) no person without right or legal licence, shall burn, &c. any goss, tuze or fern upon any forest.

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forest or chase, on pain of from 40 s.
to 5 l. Page 224

FIDELITY.—*Vide Oaths.*

FIGHTING.—*Vide Duel. Murder. Affray. Riot. Piracy.*

FIRE.—*Vide Arson. Burning. Incendiarists.*

- 1 By 6 Ann c. 31.—12 Geo. 3. c. 73. f. 35.—14 Geo. 3. c. 78. f. 84. if any menial or other servant, through negligence shall fire or cause to be fired any dwelling house or out-house they shall forfeit 100 l. on conviction by one witness, &c. or suffer eighteen months imprisonment. 197. c. 53

F I R.—*Vide Trees.*

FIREWORKS.

- 1 By 9 & 10 W. 3. c. 7. to make, sell or expose to sale any fireworks, or any cases, moulds, or implements for making them, incurs a penalty of 5 l. 365
- 2 If any person shall, or shall suffer fire works to be *let off* in or from their house in any public street or highway, they shall forfeit 20 s. 364
- 3 And every such offence shall be adjudged a common nuisance. *ibid.*

FIRE ENGINE.

- 1 By 9 Geo. 3. c. 29. to damage or destroy any fire engine belonging to any colliery, on conviction within eighteen months, incurs a penalty of transportation. 238, f. 4

F I S H.

- By 5 Eliz. c. 21. to destroy fish ponds, &c. incurs three months im-

prisonment, security for seven years, and compensation to the party grieved. Page 221

- 2 By 4 & 5 W. 3. c. 23. no persons, except fishermen and the owners of fisheries shall keep nets, &c. f. 2
- 3 By 22 & 23 Car. 2. c. 25. no person shall use any net, &c. in the fishery of another without the consent of the owner. f. 3
- 4 By 9 Geo. 1. c. 22. whoever, *armed and disguised* shall steal fish, or rescue an offender, shall suffer without benefit of clergy. 222 f. 4
- 5 By 5 Geo. 3. c. 14. whoever shall enter into any inclosed place belonging to a dwelling house where a stream of water shall run, and steal or destroy fish, or buy them, &c. shall be transported for seven years. f. 5
- 6 And to steal or destroy fish, in any inclosed ground being private property incurs a penalty of 5 l. on conviction in a summary way. f. 6
- 7 Lord Mansfield's opinion upon this act. 223. (N)
- 8 By 3 Ed. 1. c. 20. trespassers in fish ponds shall suffer three months imprisonments, &c. 510. f. 92
- 9 No salmon unless eighteen inches from the eye to the tail, or the spawn of salmon shall be destroyed in certain rivers, &c. f. 93
- 10 No salmon under 6 lb. weight shall be sent to London. f. 94
- 11 No salmon to be taken from April to Midsummer. f. 95
- 12 No nets called stalkers shall be used. f. 96
- 13 By 17 Rich. 2. c. 19. The lord mayor of London shall preserve the fish in the Thames and Medway. f. 97
- 14 What *fixes* other fish shall be of before they are taken. 519 f. 98
- 15 Of the kind of nets which may be used. *ibid.*
- 16 How offenders may be punished. 518
- 17 No person shall take or have possession of any unfixable fish, or any out of season, or any timelt, not 5 inches long. f. 99
- 18 No persons shall fasten nets over rivers to stand both day and night. 100

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- 19 The penalty and rules for fishing on the coasts of the sea. *Page* 101, 102
- 20 No fish under certain sizes shall be sold except the same be sold for or under 6 d. a pound. 103, 04
- 21 Within what time lobsters shall be taken. 105
- 22 Rules respecting the importation of fish. 520

FINGER.

- 1 Cutting off, or disabling, or weakening a man's hand or finger, is esteemed a *maim*. 175 f. 2
- 2 It is punishable with fine and imprisonment. 176
- 3 By 22 & 23 Car. 2. c. 1. to disable any limb or member, with intention to maim and disfigure, is death without clergy. f. 4

FLEET.

- 1 By 22 Geo. 2. c. 33. every person in the *fleet* who shall waste, embezzle, or not carefully preserve any powder, shot, ammunition, or other stores and provisions, their abettors, buyers and receivers, being persons subject to naval discipline shall be punished at the discretion of a court martial. 76 f. 20
- 2 And every person in the fleet who shall burn or set fire to any magazine, or store of powder, or ship-boat, &c. or the tackle thereto belonging, not then appertaining to an enemy, pirate, or rebel, on conviction by court martial, shall suffer death. *ibid.*
- 3 Whoever, in his majesty's fleet, shall be guilty of profane cursing and swearing, they shall be punished by the discretion of a court martial. 13
- 4 A court martial also shall condemn any person in the fleet guilty of sodomy, to death. 10

FLOUR.—*Vide Bread.*

FLOUNDERS.—*Vide Fish.*

FOOTWAY.—*Vide Nuisance. Highway.*

- 1 There are three kinds of ways, 1st. a footway; 2d. a pack and prime way, which is both a horse and a footway; 3d. a cart way. *Page* 366
- 2 A nuisance in a footway is punishable at the feet. *ibid.*

FORCE.—*Vide Robbery. Black Act.*

- 1 To withstand the authority of the king, in a violent and forcible manner, is an overt act of levying war. 54 f. 23
- 2 What degree of force a man must endeavour to resist to excuse him from the guilt of treason. *ibid.* (N) 3
- 3 By 25 Geo. 2. c. 10. by force to enter into any black lead mine, with intent to take and carry away any cawke, &c. is punishable by whipping or transportation. 218
- 4 Forcibly to enter any place with intent to destroy the looms, &c. in the linen, woollen, cotton, and silk, &c. manufacture, is felony without clergy. 239, 240

FORCIBLE ENTRY AND DETAINER.

- 1 By common law, a man, within proper time, might regain *his possession* by force; and he may now justify the retaking of his goods, wrongfully withheld. 274 c. 61
- 2 But such a repossession of *lands* is now restrained. f. 2
- 3 On an action for a forcible entry, if the defendant proves his title to the lands, &c. he shall not pay damages to the plaintiff for *the force*; but he may be punished as a disturber of the public peace. f. 3
- 4 An indictment lies at common law for a forcible entry; but the actual force must be charged. *ibid.* (N) 1
- 5 By 2 Ed. 3. if arms which strike a terror, are used in making the entry, the

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for words must be expressed and
 falsehood to make a writing libel-

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W O U N D

In what case the wounding another
 may be justified or excused. 259,

260, 268, 301

PIRE. — *See Wharf, Ships and
 Steepers &c.*

W R I T I N G S.

1 Writings cannot, by the common
 law, be the subject of *larceny*. Page

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2 But by 2 Geo. 2. c. 25. to make the
 writings therein enumerated a felony
 of like nature as stealing the proper-
 ty, they are calculated to secure, &c.

ibid.

